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The NLRA's "Guard Exclusion": An Analysis of Section 9(b)(3)'s Legislative Intent and Modern-Day Applicability

INTRODUCTION

Section 9(b)(3) of the National Labor Relations Act,¹ which was added to comprehensive federal labor legislation in 1947 by the Taft-Hartley amendments,² is often referred to as the "guard exclusion" because of the restrictions it places on guard employees³ in their choice of a bargaining unit and a bargaining representative. The statute prohibits the National Labor Relations Board⁴ from finding appropriate any bargaining unit that contains both guard and nonguard employees and from certifying any labor orga-

1. National Labor Relations (Wagner) Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (1982)). For the remainder of this Note, the National Labor Relations Act of 1935 will be referred to as "the NLRA."

The following excerpt includes § 9(b)(3), as added in 1947, along with the NLRA's § 9(b) introductory clause:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the union appropriate for the purposes of collective bargaining, shall be the employer unit, craft unit, plant unit, or subdivisions thereof: *Provided*, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

29 U.S.C. § 159(b)(3) (1982) (emphasis original).

2. Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-97 (1982)). In this Note, the Labor Management Relations Act of 1947 will be referred to as "the Taft-Hartley Act," "the Taft-Hartley amendments," or simply as "the Act."

3. Section 9(b)(3) itself defines a "guard" employee as "any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." 29 U.S.C. § 159(b)(3) (1982). The Board and the federal courts now recognize three basic classifications of "guard" employees. *See infra* note 58 and accompanying text.

4. The National Labor Relations Board was created under § 3(a) of the NLRA and exists as "an agency of the United States." *See* 29 U.S.C. § 153(a) (1982). This Note will refer to the National Labor Relations Board as either "the NLRB" or "the Board."

nization that admits both guards and nonguards to membership.⁵ In effect, then, the statute regulates the membership composition of American unions. The essence of the controversy surrounding section 9(b)(3) is whether such regulation—via the “guard exclusion”—is consistent with fundamental employee rights first conferred by the NLRA in 1935. Under section 7 of the NLRA,⁶ statutory “employees” are granted the right to organize and bargain collectively through representatives of their own choosing. Because section 9(b)(3) limits the organizational choices of guard employees, its coexistence with section 7 creates an apparent anomaly in the federal labor laws. This situation, in turn, has complicated administrative and judicial interpretation of the “guard exclusion.”

The debate over section 9(b)(3) is fueled by the statute’s unclear legislative intent. Soon after the statute’s passage, the contemplated breadth of its “guard” definition⁸ and its “indirect affiliation” term⁹ was brought into

5. See 29 U.S.C. § 159(b)(3) (1982). One often-quoted decision urged that “[s]ection 9(b)(3) is a limitation not upon employee rights but upon Board powers.” *NLRB v. Bel-Air Mart, Inc.*, 497 F.2d 322, 327 (4th Cir. 1974). This statement is somewhat misleading in that to prohibit the Board from finding appropriate any unit that contains both guard and nonguard employees and from certifying any labor organization representing guards that also admits to membership nonguards, or that is directly or indirectly affiliated with an organization that admits to membership nonguards, necessarily restricts the organizational rights and choices of guard employees.

6. 29 U.S.C. § 157 (1982). The statute is in the same form today as it was following the Taft-Hartley amendments of 1947:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment

Id.

7. The statutory definition of “employee” is set out in the comprehensive labor laws under § 2(3). See 29 U.S.C. § 152(3) (1982). In the original House report on the Taft-Hartley Act, plant police were classified under the “supervisor” definition and were denied the rights of statutory “employees” in the House version. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 49-50 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 340-41 (1948). The Senate proposal, however, restricted the definition of “supervisor” to exclude police so that guards would be regarded as “employees” within the statute; the conference committee subsequently adopted this measure. See H.R. REP. NO. 510, 80th Cong., 1st Sess. 35 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 539 (1948); see also 93 CONG. REC. 6499 (1947) (statement of Sen. Taft in exchange with Sen. Murray regarding compromise).

8. See *supra* note 3. For an in-depth analysis of the “guard” definition, see Kahn, *The NLRB’s Misinterpretation of the Guard Provision*, 35 LAB. L.J. 328 (1984); see also Annot., 45 A.L.R. FED. 428 (1979).

9. Under § 9(b)(3), “no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees

question. More recently, however, inquiries into congressional purpose have shifted to other aspects of the statute. The current dispute over section 9(b)(3) is confined to three opposing viewpoints. The first position, which is advocated by many supporters of the American labor movement, depicts the regulatory design of the statute as repugnant to those rights granted employees under section 7; because proponents of this stance insist that the provision creates an unwarranted impediment to the organizational efforts of guard employees, they seek its repeal. A second, less radical position promotes a narrow interpretation of section 9(b)(3) so that the limitations placed on Board certification of mixed guard-nonguard unions¹⁰ are not applied to preclude these organizations from achieving status as the collective-bargaining representative of an appropriate guard unit.¹¹ The final position advocates a broad interpretation of the statute, which results in restrictions on the access of mixed unions to Board processes. By adopting the latter view in its most recent decisions construing section 9(b)(3),¹² the NLRB made clear that it will not allow its mechanisms to be utilized in furtherance of an end it believes the statute was designed to avoid: "the representation of guard employees by a union which admits to membership employees other than guards."¹³

This Note analyzes the development of administrative and judicial interpretation of section 9(b)(3) and argues that the construction most recently adopted by the NLRB is an accurate depiction of the statute's legislative intent. To facilitate a better understanding of the statute's history, Part I examines the origin of the provision and emphasizes the dynamic forces that led to passage of the Taft-Hartley Act. Part II commences with a summary of early statutory construction during the 1940's and 1950's and ends with a capsulation of interpretive trends in the 1960's and 1970's. Current construction is discussed in Part III as a means to advance what this Note proposes is the legislative purpose of section 9(b)(3). With the fundamental designs of the statute thus revealed, Part IV considers the realities of today's

other than guards." 29 U.S.C. § 159(b)(3) (1982) (emphasis added). Background information on the "indirect affiliation" term can be found in Cox, *The Changing Guards: An Appraisal of Plant Guards and Their Representation Rights*, 15 LAB. L.J. 391 (1964).

10. A "mixed guard-nonguard union" is one which represents guards but which also admits nonguards to membership or is affiliated directly or indirectly with an organization which admits nonguards. For the purposes of this Note, the abbreviated term "mixed union" will be used to denote such an organization.

11. This position was reiterated recently by Board Member Zimmerman, who dissented in the two most current and definitive NLRB opinions construing § 9(b)(3). See *The University of Chicago*, 272 N.L.R.B. 873 (1984) (Zimmerman, M., dissenting); *Brink's Inc.*, 272 N.L.R.B. 868 (1984) (Zimmerman, M., dissenting).

12. *University of Chicago*, 272 N.L.R.B. 873; *Brink's*, 272 N.L.R.B. 868.

13. *Brink's*, 272 N.L.R.B. at 870; see also *University of Chicago*, 272 N.L.R.B. at 876.

workplace, raising some doubts as to whether section 9(b)(3), as written and applied, remains viable in a modern-day context.

I. THE ORIGIN OF SECTION 9(b)(3)

The American labor movement experienced a series of transformations during the 1940's due in great part to the pervasive impact of World War II. In the first half of that decade, as the nation's labor force expanded to meet wartime production demands, union membership increased dramatically and made organized labor a powerful factor in the economy.¹⁴ The bolstered economic influence of labor, however, became a source of public concern because union activity was perceived as a threat to fulfillment of production levels required by the war effort.¹⁵ Faced with a widespread outbreak of coal strikes in the early part of 1943, Congress addressed the anxieties of its constituents through passage of the War Labor Disputes Act, a measure which allowed the government to intervene and short-circuit labor strife.¹⁶ On the whole, however, stability in the sphere of labor relations prevailed for the duration of the war; nevertheless, the reputation of organized labor suffered greatly.¹⁷ Thus, soon after the war ended, recurring tensions in labor relations necessitated reappraisal of federal labor policy.

A. *Passage of the Taft-Hartley Act*

The Taft-Hartley Act was passed into law on June 23, 1947, over the presidential veto of Harry S. Truman.¹⁸ The Act addressed what its sponsors

14. The nation's labor force increased more than 20% in size during a six-year period, enlarging from 54,230,000 in 1939 to 66,650,000 by August 1945. More impressive, however, was the jump in union membership, which went from 8.5 million in 1940 to 13.75 million in 1944. See B. TAYLOR & F. WITNEY, *LABOR RELATIONS LAW* 207 (4th ed. 1983).

15. Wartime labor policy was based on the premise that the "United States could not become the arsenal of democracy without the whole-hearted cooperation of organized labor, and the surest method of obtaining cooperation was to give unions a permanent role in directing the mobilization and allocation of our national resources." A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 82 (9th ed. 1981). The apprehensive wartime attitude of the American public toward organized labor, then, can be attributed in part to the great dependency placed upon the nation's industrial sector; dependency, in turn, bred a sense of vulnerability with regard to the possibility that labor would withhold its crucial services. For a good, general history of labor policy and labor developments during World War II, see B. TAYLOR & F. WITNEY, *supra* note 14, at 221-26.

16. War Labor Disputes (Smith-Connally) Act, ch. 144, 57 Stat. 163 (1943). This piece of legislation passed Congress over the presidential veto of Franklin D. Roosevelt.

17. As a result of its well-kept wartime pledge not to strike, organized labor contributed greatly to the maintenance of industrial stability during World War II. Unfortunately, some of labor's occasional digressions did not escape public scrutiny: "The overall plan for wartime labor peace was highly successful . . . [but] strikes that did occur during World War II received widespread public attention and was [sic] not forgotten in the postwar period when national labor policy was reconsidered." B. TAYLOR & F. WITNEY, *supra* note 14, at 222-23.

18. Truman's disdain for the measure was apparent in his veto message to the House of

and supporters viewed to be an imbalance in the relative bargaining strength between organized labor and management.¹⁹ Substantial controversy accompanied passage of the Act because of its overriding objective to curb the power of unions,²⁰ a purpose which prompted hostile reactions from pro-labor segments of the society.²¹ Efforts to defeat enactment of the legislation, however, were frustrated by the negative attitude that politicians and the general public adopted toward labor's role in the postwar economy.²² Although the causes of this animosity were numerous and complex,²³ the Taft-

Representatives:

The bill taken as a whole would reverse the basic direction of our national labor policy, inject the Government into private economic affairs on an unprecedented scale, and conflict with important principles of our democratic society. Its provisions would cause more strikes, not fewer. It would contribute neither to individual peace nor to economic stability and progress. It would be a dangerous stride in the direction of a totally managed economy. It contains the seeds of discord which would plague this Nation for years to come.

93 CONG. REC. 7485 (1947).

19. As one commentator pointed out, the desire to maintain an equilibrium between management and labor is an inherent aspect of labor relations: "The fundamental assumption underlying virtually all labor legislation is that, in the main, interaction between management and labor is on the conflict level and that in order to assure justice to the parties concerned, equality of strength must be realized." Daykin, *Collective Bargaining and the Taft-Hartley Act*, 33 IOWA L. REV. 623, 623 (1948).

20. There is little, if any, doubt remaining that the Act's *raison d'être* was to lessen the power and prestige of organized labor. One commentator, in his initial reactions to passage of the Act, recognized that the Taft-Hartley amendments were the culmination of a legislative trend that was "anti-union" in nature. See Daykin, *supra* note 19, at 624; see also A. Cox, D. BOK & R. GORMAN, *supra* note 15, at 81-87.

21. As evidence of their disaffection with the Act, supporters of the American labor movement commonly referred to the legislation as the "slave labor law." Analyzing the origins and impact of the Taft-Hartley Act, two authors observed that it "substantially changed the direction of industrial relations, and its effect was to produce a controversy never known to follow the passage of a single labor law." B. TAYLOR & F. WITNEY, *supra* note 14, at 215.

22. Believing that an already troubled postwar economy would be worsened if the "vices" of unions went unchecked, "Congress and the public were convinced that new labor legislation would alleviate many of the perceived abuses of organized labor." *Id.* at 228.

23. One law journal symposium, in looking back at the Act 10 years after its passage, examined many of the coexisting factors that shaped public opinion in the mid-1940's with respect to organized labor. See *The Taft-Hartley Act After Ten Years: A Symposium*, 11 INDUS. & LAB. REL. REV. 327 (1958). One of the symposium's contributors emphasized the multifarious nature of societal conditions leading up to passage of the Act:

The passage of the Taft-Hartley Act in 1947 was the result of a peculiar combination of circumstances. Of these, the strike wave of 1946 was probably the most important, but it was by no means sufficient in itself to explain the drastic changes in our national labor policy initiated by the new statute. Other factors having an important influence upon the legislation included the resurgence of the Republican party after fifteen years of New Deal domination, the relatively acute inflation, and the growing concern over the enhanced power and prestige of organized labor, which was heightened by the asserted penetration of the Communist party into key sections of the labor movement. Nor was this all. By 1947 the American people were in the grip of a profound postwar disillusionment. A predictable reaction to the frustrations resulting from our deteriorating relations

Hartley Act was, in the end analysis, a "crystallization of public sentiment."²⁴

The notion that the Taft-Hartley Act was a creature of its own historical context is consistent with the rationale behind section 9(b)(3)'s incorporation into the Act. The "guard exclusion," which imposes certain restrictions on the Board when it encounters the organizational efforts of guard employees,²⁵ was originally drafted in reaction to wartime dealings with plant protection forces.²⁶ Before the United States entered World War II, private employers in most instances had direct control over plant guards.²⁷ This changed, however, when approximately 200,000 of the country's guards were made civilian auxiliaries to the military police following the events at Pearl Harbor.²⁸ Driven by a desire to organize and bargain collectively, plant guards thereafter sought protection of the NLRA.²⁹ In response to the new aspirations of guard employees, the Board adopted relatively liberal wartime policies with regard to plant guards, granting them full protection of the

with our wartime allies, especially the Soviet Union, and from our futile pursuit of the illusion of prewar "normalcy" was the singling out of certain people and institutions as the special objects of public wrath. *Unions and the collective bargaining system were among the scapegoats selected*, and the uncompromisingly hostile reactions of union leaders, . . . only served to whip up clamor for punitive legislation.

Aaron, *Amending the Taft-Hartley Act: A Decade of Frustration*, 11 INDUS. & LAB. REL. REV. 327, 327 (1958) (emphasis added).

24. Daykin, *supra* note 19, at 624. Though many of the Act's critics consider it to be an anachronism, the longevity of the Taft-Hartley Act cannot be denied. Efforts to amend or repeal it have been numerous, and one of the more recent and formidable campaigns was mounted by the Carter Administration in the shape of the Labor Reform Act of 1977. *See* S. 1883, 95th Cong., 1st Sess. (1977); H.R. 8410, 95th Cong., 1st Sess. (1977); *see also infra* note 202. The Labor Reform Act was defeated in the summer of 1978 when an attempt to shut off a Senate filibuster failed by only two votes. Two-and-a-half years later, Ronald Reagan entered the White House, and his election, coupled with a Republican-controlled Senate, "caused unions to lose all hope in the foreseeable future for improvement in Taft-Hartley." B. TAYLOR & F. WITNEY, *supra* note 14, at 244.

25. *See* 29 U.S.C. § 159(b)(3) (1982); *see also supra* note 5.

26. Guard employees, by the very nature of their role as protectors of America's war output in the industrial sector, bore a disproportionate brunt of the controversy that surrounded organized labor for the course of World War II and thereafter. The tension and hostility aroused by their organizational efforts had a direct impact on hearings before the Board because "few single questions [were] contested in the NLRB proceedings more often during [World War II] than union organization of plant guards." 15 LAB. REL. REP. (BNA) 4 (1945).

27. Up until the late 1930's, plant guards were a strong arm of employers in that they were exceedingly hostile to unionism and often resorted to physical violence in order to ward off labor organizers that came on plant property. *See* Cox, *supra* note 9, at 391-92.

28. Plant guards were militarized on December 12, 1941, by way of a presidential directive. *See* Exec. Order No. 8972, 6 Fed. Reg. 6420 (1941).

29. By the early 1940's, plant guards began to settle into traditional duties that were more in keeping with their job titles, including the maintenance of order, the guarding of payrolls, and the quelling of disturbances; anti-unionism was no longer an integral part of their job descriptions. At about this same time, the typical plant guard "began to identify himself as an employee and find that his interests were not unlike those of other industrial employees." Cox, *supra* note 9, at 392.

law as "employees" under the NLRA³⁰ and permitting them to freely choose a bargaining representative as long as they were placed in units separate from those of nonguard employees.³¹ The United States Supreme Court explicitly sanctioned this Board procedure in 1947 when it decided the companion cases of *NLRB v. E.C. Atkins & Co.*³² and *NLRB v. Jones & Laughlin Steel Corp.*³³ The latter case played a key role in the formulation of section 9(b)(3).

B. The Legislative History of Section 9(b)(3)

The Supreme Court's opinion in *Jones & Laughlin* was handed down at a time when the Taft-Hartley amendments were still the subject of committee hearings on Capitol Hill. The decision subsequently became an impetus for the final version of section 9(b)(3). In *Jones & Laughlin*,³⁴ the Court ruled 5-4 that the Board's practice of placing guards in units separate from other employees and permitting them to choose a bargaining representative free of restrictions was consistent with then-existing labor and wartime policy.³⁵

30. Despite the exigencies of the times and the formidable opposition of employers who took the position that guards were too closely aligned with management to be allowed protection of the NLRA, the Board determined that guards fell within the statutory definition of "employee." See *Armour and Co.*, 63 N.L.R.B. 1200 (1945); *Dravo Corp.*, 52 N.L.R.B. 322 (1943); *United States Elec. Motors, Inc.*, 45 N.L.R.B. 298 (1942); *Chrysler Corp.*, 44 N.L.R.B. 881 (1942); *Phelps Dodge Copper Prods. Corp.*, 41 N.L.R.B. 973 (1942); *Automatic Prods. Co.*, 40 N.L.R.B. 941 (1942).

31. In the often-cited *Chrysler Corp.* decision, the Board set out the basic rationale for its position on the organizational efforts of plant guards during wartime:

We perceive no necessary conflict between self-organization for collective bargaining and the faithful performance of duty. Freedom to choose a bargaining agent includes the right to select a representative which has been chosen to represent other employees of the employer in a different bargaining unit. We are mindful of the increased responsibilities placed upon plant-protection employees in wartime, but the practices and procedures of collective bargaining are flexible, and may make full allowance for such added responsibilities . . . In any event, the remedy for inefficiency of willful disregard or neglect of duty on the part of the plant-protection employees lies implicitly in the power of the Company to discipline or discharge them and in the power of the military authority to take all necessary steps to protect the public interest.

44 N.L.R.B. at 886.

32. 331 U.S. 398 (1947).

33. 331 U.S. 416 (1947).

34. The *Jones & Laughlin* case involved the representation of 72 militarized plant protection employees by a union affiliated with a labor organization that admitted nonguards to membership. See 331 U.S. at 419.

35. The majority in *Jones & Laughlin* was convinced that the Board had taken into account all of the applicable policy considerations:

As in the case of militarized guards, the Board has found no evidence that when deputized guards join unions or engage in collective bargaining through freely chosen representatives their honesty, their loyalty to police authorities, or their competence to execute their police duties satisfactorily is undermined. It is sufficient, in the Board's judgment, to protect the special status of these guards by segregating them in separate bargaining units.

331 U.S. at 429.

This decision reversed the Sixth Circuit Court of Appeals,³⁶ which found representation of an appropriate guard unit by a mixed union unacceptable because it potentially split loyalties of guards between obligations owed to their union and obligations owed collectively to their employer and the federal government.³⁷ The Supreme Court rejected the "divided loyalty" concern as being without merit³⁸ and instead stressed that any such limitation on the guards' choice of union representative made "the collective bargaining rights of the guards distinctly second-class."³⁹

The conclusions reached by the Supreme Court in *Jones & Laughlin* were greeted with disapproval by many of the legislators working to sharpen the focus of the Taft-Hartley amendments. In explaining the final version of section 9(b)(3), the conference summary of the Act⁴⁰ specifically mentioned that, during consideration of the statute, the conferees were "impressed" with the Sixth Circuit's reasoning in *Jones & Laughlin*.⁴¹ Further, the House's report on its version of the legislation emphasized that, because plant guards

36. The Sixth Circuit's first ruling in *Jones & Laughlin* was remanded for further consideration in light of the de-militarization of the plant guards. See 146 F.2d 718 (6th Cir. 1945) (first decision), *remanded*, 325 U.S. 838 (1945). On remand, the court of appeals found de-militarization irrelevant to its earlier findings and thus reiterated its original position on the matter. See 154 F.2d 932 (6th Cir. 1946) (second opinion).

37. In its first *Jones & Laughlin* opinion, the Sixth Circuit denied enforcement of the Board's order finding the union as the appropriate representative and ruled that the Board should have given more consideration to the national welfare due to the fact that

these employees might in an effort to discharge their duty to their employer find themselves in conflict with other members of their Union over the enforcement of some rule or regulation they were hired to enforce; or upon the other hand, in conflict with the Federal Government because of fealty to the Union at the time of a dispute involving the public interest. We think that the imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the free flow of commerce.

146 F.2d at 722-23. On remand, the Sixth Circuit highlighted these concerns again. See 154 F.2d at 933, 935.

38. 331 U.S. 416 *passim* (1947).

39. *Id.* at 425. The Supreme Court emphasized that guard employees, like all other employees, were at a distinct disadvantage in relation to the employer as far as bargaining power was concerned. According to the Court, treating guards differently than other employees was therefore an unjustified subjugation of their status. Consequently, the right to select a bargaining representative "must mean complete freedom to choose any qualified representative unless limited by a valid contrary policy adopted by the Board." *Id.*

40. The House of Representatives Conference Report, H.R. REP. NO. 510, 80th Cong., 1st Sess. 1 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 505-73 (1948), was subsequently summarized and presented to the Senate for debate on June 5th and June 6th of 1947. See 93 CONG. REC. 6436-58, 6495-6536 (1947). On June 6th, the conference report was approved by a vote of 54-17 with 24 abstentions. *Id.* at 6536.

41. See 93 CONG. REC. 6444 (1947). In reference to the decisions rendered by the Sixth Circuit in *Jones & Laughlin*, the report said that, although the Supreme Court had reversed the ruling below on the ground that the Board was within its powers to certify a mixed union, "four of the Justices agreed with the Circuit Court of Appeals holding that this was an abuse of the discretion permitted to the Board under the act." *Id.*

were hired to prevent disorders and to report the misconduct of employees and unions, divisions of loyalty represented a very real threat to the maintenance of stable labor relations.⁴² For that reason, the House sought to completely exclude plant guards from coverage of the federal labor laws; only through an eventual compromise were guards allowed coverage under the Act.⁴³ This compromise, however, did not detract from the vitality of the "divided loyalty" concern. The conference committee believed that denying guards protection of the Act was too radical a response to such fears, but its approval of the Sixth Circuit's analysis of the issue, coupled with the restrictions placed on Board powers in the final draft of section 9(b)(3), showed appreciation of the potential for conflicting obligations.⁴⁴ Whether these concerns were to be afforded their due weight in execution of the statute depended upon the interpretation given section 9(b)(3) by the Board and the federal courts.

II. THE HISTORY OF ADMINISTRATIVE AND JUDICIAL INTERPRETATION

As highlighted previously, the Taft-Hartley Act emerged as a result of factors unique to American labor relations in the 1940's.⁴⁵ Section 9(b)(3) itself was a response to the important duties and responsibilities assumed by plant protection employees during the turbulent experience of World War II.⁴⁶ In construing section 9(b)(3), therefore, the spirit of the times during which the Act was passed must be considered, and, moreover, an effort

42. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 16 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 307 (1948). The House report stressed that "just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and *loyal to it* persons not subject to [the] influence . . . of unions." *Id.* (emphasis added).

43. See *supra* note 7.

44. The first part of § 9(b)(3) simply adopted established Board practice in that the statute directed the Board to continue to find a mixed *unit* of guards and nonguards inherently inappropriate. Thus, standing alone, this part of the statute would go no further than the Supreme Court's opinion in *Jones & Laughlin*, a decision the conferees implicitly rejected for its failure to adequately perceive the "divided loyalty" concern. It seems quite clear, then, that the second half of § 9(b)(3) was included because the statute's drafters were not satisfied that the first proscription was wide enough in breadth to prevent conflicting obligations. Read this way, § 9(b)(3) represents a comprehensive "guard exclusion" enacted to wholly discourage the formation of both mixed *units* and mixed *unions*. See The University of Chicago, 272 N.L.R.B. 873, 876 n.25 (1984). The theory that § 9(b)(3) was designed to discourage such formation—via the prohibition on Board certification of mixed unions—finds some support in the statements of Senator Taft during floor debate of the conferees' compromise. With regard to plant guards, Taft said the committee "provided that they could have the protection of the [NLRA] *only if they had a union separate and apart from the union of the general employees.*" 93 CONG. REC. 6445 (1947) (emphasis added); see also Cox, *supra* note 9, at 393.

45. See *supra* notes 14-33 and accompanying text.

46. See *supra* notes 28-31 and accompanying text.

should be made to probe beneath the literal meaning of the statute's wording and thereby glean the legislative intent of the provision.⁴⁷ Definitive interpretation of section 9(b)(3) in this vein, however, has proved elusive.

A. Early Interpretation

1. The "Guard" Definition⁴⁸

Soon after passage of the Taft-Hartley Act, the Board sent out conflicting signals on what it perceived to be the correct interpretation of section 9(b)(3) with regard to the "guard" definition.⁴⁹ In *C.V. Hill & Co.*,⁵⁰ the Board expanded the statute's definition of "guard" by ruling that the employer's watchmen fell within the meaning of section 9(b)(3).⁵¹ The effect of this holding was to single out a sizeable group of employees engaged in nominal guard-like duties and restrict them from freely choosing a bargaining representative.⁵²

Just four months later, however, the Board adopted a new, extremely narrow definition of "guard." In *Brink's Inc.*,⁵³ the Board refused to include armored truck guards within the terminology of section 9(b)(3), reasoning

47. Statutory interpretation is a highly tenuous discipline; it becomes all the more inexact when exercised on a federal level by an administrative agency—such as the NLRB—and subsequently by a reviewing court of law. Rules of statutory interpretation are notoriously vague and unsettled, and one well-known commentator has pointed out that "there are two opposing canons [of statutory construction] on almost every point." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950). To emphasize these dichotomies, Llewellyn set out an expansive list of opposing construction doctrines to stress the "technical framework for maneuver." See *id.* at 401-06.

Nevertheless, the unique factors surrounding passage of the Taft-Hartley Act require consideration of one specific doctrine dictating that acts of Congress be interpreted by taking into account the spirit in which they were written and the reasons for their enactment. See, e.g., *Watt v. Alaska*, 451 U.S. 259, 266 (1981); *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 619 (1967); *United States v. Ryan*, 284 U.S. 167, 175 (1931); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). According to this view, to do otherwise is to invite the possibility that literalness will "strangle meaning." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946). In *Church of the Holy Trinity*, the Supreme Court articulated an extremely broad tenet of interpretation that has been frequently followed: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." 143 U.S. at 459.

48. Determination of the "guard" definition's parameters deserves considerable attention due to the direct impact that the definition has on the rights of those employees found within it.

49. The "guard" definition is announced in § 9(b)(3) itself. See 29 U.S.C. § 159(b)(3) (1982); see also *supra* note 3.

50. 76 N.L.R.B. 158 (1948).

51. *Id.* at 165.

52. See B. TAYLOR & F. WITNEY, *supra* note 14, at 363.

53. 77 N.L.R.B. 1182 (1948).

that repeated use of the phrase "plant guards" in the Act's legislative history showed that Congress intended to refer only to persons employed to guard the employer's premises, not to persons employed to guard property of the employer's customers.⁵⁴ Member Murdock wrote a strong dissent in *Brink's*,⁵⁵ expressing his opinion that armored truck guards fit the literal definition of "guard" in the statute⁵⁶ and that such an interpretation was harmonious with the Board's decision in *C.V. Hill*. This apparent contradiction in the respective holdings of *C.V. Hill* and *Brink's* marked an inauspicious beginning to Board interpretation of section 9(b)(3).

From 1948 to 1953, an already muddled picture of statutory construction was made worse by seven separate Board decisions involving the American District Telegraph Company ("ADT") and its subsidiaries.⁵⁷ The "guards" in all of those cases were employed to install and maintain electronic alarms on the premises of ADT's subscribers and were thus so-called "contract guards," whose duties differ very little from those of traditional plant guards except that they perform their jobs on a customer's property.⁵⁸ In analyzing the status of these "contract guards" within the meaning of section 9(b)(3), the Board managed to further distort the Act's legislative history regarding the "divided loyalty" concept.

In one of the earlier ADT cases,⁵⁹ the Board ruled 3-2 that the employees in question fulfilled the "guard" definition because they functioned in a

54. *Id.* at 1185-86.

55. *Id.* at 1187-89 (Murdock, M., dissenting).

56. Member Murdock found unpersuasive the frequent reference to "plant guards" in the legislative history of the Taft-Hartley Act: "The mere fact that Congress may have had plant guards primarily in mind in framing Section 9(b)(3) does not prove that armored-truck guards do not come under the section if they fall within the definition of 'guard' contained therein." *Id.* at 1188. Only when kept within certain bounds is Murdock's argument convincing. Congress, in formulating § 9(b)(3), could not have possibly foreseen all circumstances under which the potential for divided loyalties would arise. Legislative history, therefore, did not focus on plant guards because Congress was concerned only with this particular classification of employees, but rather because it was highly concerned with the "divided loyalty" situation that these guards, by the nature of their duties, often created. Thus, one could plausibly maintain that § 9(b)(3) should apply to any classification of employees who may, by virtue of their guard-like duties, give rise to a valid "divided loyalty" concern. See Kahn, *supra* note 8, at 343; see also *infra* notes 200-01 and accompanying text.

57. American Dist. Tel. Co. of Pa., 100 N.L.R.B. 155 (1952), *enforcement denied sub nom.* NLRB v. American Dist. Tel. Co., 205 F.2d 86 (3d Cir. 1953); American Dist. Tel. Co., 89 N.L.R.B. 1228 (1950); American Dist. Tel. Co., 84 N.L.R.B. 162 (1949); American Dist. Tel. Co. of Mo., 83 N.L.R.B. 1139 (1949); American Dist. Tel. Co., 83 N.L.R.B. 517 (1949); American Dist. Tel. Co., 78 N.L.R.B. 864 (1948); American Dist. Tel. Co. of San Francisco, 78 N.L.R.B. 150 (1948).

58. Traditional plant guards and "contract guards" are to be distinguished from a third classification as well: armored truck drivers. This third classification performs only a fraction of the duties assumed by the first two groups of guards. See Kahn, *supra* note 8, at 333-34, 342-43; see also *infra* notes 186-201 and accompanying text.

59. American Dist. Tel. Co., 83 N.L.R.B. 517 (1949).

capacity indistinguishable from plant guards.⁶⁰ The decision overruled *Brink's* to the extent that the earlier holding did not give "guard" status to employees who protected property belonging to a person other than their own employer.⁶¹ The "guard" definition was in issue again one year later when, following a change in the composition of the Board, it was decided 3-2 that the prohibitions of the statute were aimed at "persons employed . . . to protect the property of *their own Employer*, or to protect on the premises of *their own Employer* the safety of persons."⁶² This construction of legislative intent was premised upon questionable reasoning which stemmed from the Board's misguided perception of Congress' "divided loyalty" concern. Thus, this particular decision must be viewed as an aberration in the statute's case history.⁶³ Only by way of a 1953 federal court of appeals decision was this error in interpretation of section 9(b)(3) corrected.

In *NLRB v. American District Telegraph Co.*,⁶⁴ the Third Circuit addressed the fundamental question of whether the statute's "guard" definition was limited to guards who protect only the premises of their own employers.

60. *Id.* at 520. Because the duties of the ADT employees were so similar to those traditionally performed by plant guards, they were deemed to be capable of giving rise to the "divided loyalty" concern: "Clearly, the Congress intended to insulate plant guards from regular production workers employed on the guarded premises, so that the guards' primary duty of maintaining the security of those premises would not be hampered by any sense of loyalty to fellow employees other than guards." *Id.* at 519.

61. *Id.* at 520 n.6.

62. American Dist. Tel. Co., 89 N.L.R.B. 1228, 1231 (1950) (emphasis original). This ruling necessarily required reversal of American Dist. Tel. Co., 84 N.L.R.B. 162 (1949), American Dist. Tel. Co. of Mo., 83 N.L.R.B. 1139 (1949), and American Dist. Tel. Co., 83 N.L.R.B. 517 (1949).

63. See Kahn, *supra* note 8, at 336. In this particular ADT decision, the Board identified Congress' concern to be the divided loyalties that could arise if ADT's guards were represented by the same union as that of a subscriber's guards. See 89 N.L.R.B. at 1231. By determining that the employees in question were not guards, the Board's ruling seemed to increase the chance that the employees would be represented by a union directly or indirectly affiliated with the union of the subscriber's nonguard employees. This, in turn, appeared to give rise to a greater potential for divided loyalties because the ADT employees were required to initiate reports against the subscriber's employees for acts of carelessness or misconduct. Of course, in the case of armored truck guards, the fear that divided loyalties may arise between an employer's guards and a subscriber's guards is more real. During the very brief time that armored truck guards are at a customer's place of business, they most likely come into contact with nonguard and guard employees in equal numbers. The NLRB appears to be most concerned with a conflict of loyalties when armored truck guards refuse to cross a picket and fulfill their duties. See *infra* notes 71-72, 188-93 and accompanying text. It may be just as likely, however, that armored truck guards refuse to cross a picket set up by the customer's guards, who consequently might belong to the same all-guard union as the employer's guards. Under this reasoning, the "divided loyalty" concern is not avoided to any greater extent by placing armored truck guards within § 9(b)(3)'s "guard" definition. If the spirit of the statute is not thus being served, there would appear to be no justification for restricting the organizational choices of armored truck guards via § 9(b)(3).

64. 205 F.2d 86 (3d Cir. 1953).

This was the position taken by the Board in its two previous ADT decisions.⁶⁵ The court, looking strictly to the wording of section 9(b)(3), emphasized that the language referred to a "guard" as one who enforced rules to protect the property of "*the employer—not his employer.*"⁶⁶ Furthermore, the language read that such rules were to be enforced by guards against "employees and other persons," not just against "*fellow employees.*"⁶⁷ The most important contribution of the opinion, however, was the Third Circuit's re-discovery of the "divided loyalty" concern originally announced by Congress. The court believed that the original aim of section 9(b)(3) was to prevent guards at any given workplace from joining a production workers' union and thereby splitting their allegiance between fellow union workers and the employer.⁶⁸ This construction led to rejection of the Board's argument that ADT employees not be deemed "guards" within the statute because they might become members of the same union as the subscriber's *guards*.⁶⁹ The Third Circuit, therefore, cleared up much of the confusion generated by the seven ADT decisions.

Unfortunately, the Board reacted in a questionable manner to the Third Circuit's 1953 opinion. Not being content with the strides made in the treatment of "contract guards" under section 9(b)(3), the Board in *Armored Motor Service Co.*⁷⁰ enlarged the definition of the statute to encompass armored truck "guard-drivers." In that case, the Board rejected the reasoning in *Brink's* that the statute was to be narrowly construed so as to apply only to plant guards protecting their own employer's premises. Instead, the *Armored Motor* Board opted for a broad interpretation of this provision⁷¹

65. The Third Circuit denied enforcement of the Board's order below, 100 N.L.R.B. 155 (1952), which had in turn paralleled the Board's decision in *American Dist. Tel. Co.*, 89 N.L.R.B. 1228 (1950).

66. 205 F.2d at 89 (emphasis original).

67. *Id.* (emphasis original). The Third Circuit mentioned § 2(3) of the NLRA in connection with this appraisal because that provision dictates that the term "employee" include "any employee, and . . . not be limited to the employees of a particular employer, unless the Act explicitly states otherwise." See 29 U.S.C. § 152(3) (1982).

68. 205 F.2d at 89.

69. As highlighted previously, the Board's argument on this point was aberrational. See *supra* note 63 and accompanying text. The far more serious and real concern with the "contract guard" situation was, according to the Third Circuit, that ADT guards would be caught in a "divided loyalty" situation if forced to cross a picket line of fellow, nonguard unionists striking at the subscriber's plant. See 205 F.2d at 90. Though its underlying foundations are accurate, the "picket line" hypothetical is not necessarily persuasive when arguing that divided loyalties may arise simply because the occasions on which these conflicts present themselves are relatively few in number. See *infra* notes 188-93 and accompanying text. Further, dependence on the "picket line" predicament in the "contract guard" situation blurs and thus detracts from the valid distinction between "contract guards" and armored truck guards.

70. 106 N.L.R.B. 1139 (1953).

71. *Id.* at 1140. The Board argued that § 9(b)(3) did not preclude a broad interpretation: "We do not believe that Congress intended to limit the prohibition of Section 9(b)(3) to plant guards. The statutory language contains no such restriction, and we see no basis for giving it so narrow a construction." *Id.*

because it believed a conflict of loyalty could occur if armored truck guards were required to deliver money or valuables to a struck customer whose nonguard employees belonged to the same labor organization as the guards.⁷² Although the Board urged that its position on section 9(b)(3) was compatible with the Third Circuit's decision in *NLRB v. American District Telegraph Co.*,⁷³ this asserted harmony was tenuous at best. The tasks performed by armored truck guards are not truly analogous to those performed by plant guards and "contract guards." Unlike the pressing, on-going security duties assumed throughout the working day by employees of the latter two job classifications, armored truck guards spend a considerable amount of their time merely transporting money and valuables; thus, they only come into contact with nonguard employees on a peripheral basis.⁷⁴ For this reason, there is a serious question whether the employment situation presented by armored truck guards falls within the parameters of either section 9(b)(3) or the "divided loyalty" concern.⁷⁵ Because the Third Circuit implicitly found that the statute extended only to traditional plant guards and "contract guards," *Armored Motor* was not necessarily a valid or desirable extrapolation of *NLRB v. American District Telegraph Co.*⁷⁶ Nevertheless, the questionable tenets of *Armored Motor* have persisted through the years, and more recent decisions by both the Board⁷⁷ and federal courts⁷⁸ have acquiesced in a blind fashion to the norm that the decision established.

2. The "Indirect Affiliation" Term⁷⁹

Section 9(b)(3) in part precludes Board certification of any labor organization that admits to membership both guard and nonguard

72. *Id.*

73. *Id.* at 1140 n.3 (citing *NLRB v. American Dist. Tel. Co.*, 205 F.2d 86 (3d Cir. 1953)).

74. See *infra* notes 191-92 and accompanying text.

75. See *infra* notes 188-93 and accompanying text.

76. See generally Kahn, *supra* note 8, at 338. An expanded "guard" definition leads not only to potential discord with the congressional purpose of § 9(b)(3) but also may result in objectionable federal labor policy to the extent that an ever-growing definition means that more and more employees will be subjected to the strictures of the statute and thus limited in their free choice of a bargaining representative.

77. See, e.g., *Wells Fargo Armored Serv. Corp.*, 270 N.L.R.B. 787, 789 (1984) (Board noted vitality of *Armored Motor* decision).

78. See, e.g., *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5, 9 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 225 (1985); *International Bhd. of Teamsters, Local 334 v. NLRB*, 568 F.2d 12, 15-16 (7th Cir. 1977); *Drivers, Chauffeurs, Warehousemen and Helpers, Local 71 v. NLRB*, 553 F.2d 1368, 1372-74 (D.C. Cir. 1977). Both of the two latter courts intimated that the Board's inclusion of armored truck guards within § 9(b)(3)'s definition was not wholly logical but, in the end analysis, deferred to Board discretion. See *Teamsters, Local 344*, 568 F.2d at 15 (Board's interpretation "not beyond dispute"); *Drivers, Local 71*, 553 F.2d at 1374 n.15 (court unwilling to substitute its opinion for Board's expertise).

79. Though less equivocal in its approach to the "indirect affiliation" term than with the

employees.⁸⁰ Also, as a means of broadening the scope of that prohibition, Congress further forbade the Board from certifying any guard union that is directly or *indirectly* affiliated with a labor organization that admits nonguards.⁸¹ Remarks by Senator Taft during floor debate over section 9(b)(3)⁸² prompted the Board in *Mack Manufacturing Corp.*⁸³ to declare that Congress intended that "the union representing guards . . . be *completely divorced* from that representing nonguard employees."⁸⁴ One could infer from this that Congress proscribed certification of guard unions directly or indirectly affiliated with a nonguard union in order to prevent the "divided loyalty" dilemma from ever arising.

The concept of "complete divorce," however, became diluted as a result of the Board's slavish adherence to the guidelines first established in *The Magnavox Co.*,⁸⁵ a decision which pre-dated *Mack Manufacturing* by one year.⁸⁶ In *Magnavox*, the Board held that an "indirect affiliation" existed when the extent and duration of the guard union's dependence upon the nonguard union, or vice versa, indicated "a lack of freedom and independence in formulating its own policies and deciding its own course of action."⁸⁷ By rigidly applying this standard, the Board in subsequent rulings gave considerable latitude to unions in their choice of affiliation except when one union completely dominated another.⁸⁸

Under the *Magnavox* guidelines, extreme circumstances are required to find an "indirect affiliation." In 1964, the Board ruled in the *International Harvester* decision⁸⁹ that, for the purposes of section 9(b)(3), there was an "indirect affiliation" between the petitioning union and a local Teamsters union which admitted nonguards to membership. This conclusion was reached on the basis of conspicuous evidence that the petitioner received nearly \$20,000 in financial aid from the nonguard union and continued to permit outside participation in its affairs to the point of allowing the nonguard union to help organize, conduct and settle the strike.⁹⁰ The Board, however, was quick to reiterate the holdings of earlier cases in which "indirect affil-

"guard" definition, the Board has arguably departed from legislative intent as it relates to this aspect of § 9(b)(3). See generally Cox, *supra* note 9; see also *infra* notes 80-93 and accompanying text.

80. See 29 U.S.C. § 159(b)(3) (1982).

81. *Id.*

82. See 93 CONG. REC. 6445 (1947).

83. 107 N.L.R.B. 209 (1953).

84. *Id.* at 212 (emphasis added).

85. 97 N.L.R.B. 1111 (1952).

86. Curiously enough, the *Mack Manufacturing* opinion made no reference whatsoever to the holding in *Magnavox*.

87. 97 N.L.R.B. at 1113.

88. See Cox, *supra* note 9, at 394.

89. 145 N.L.R.B. 1747 (1964).

90. *Id.* at 1749-50.

iations" were not found.⁹¹ The *International Harvester* decision, then, suggests that only blatant financial and organizational assistance constitutes "indirect affiliation" under section 9(b)(3). Such an interpretation, though, renders meaningless the statute's explicit demarcation of "direct" and "indirect" affiliation because the elements deemed necessary to find either are basically identical.⁹² This interpretation is inconsistent with the very language of section 9(b)(3), yet the Board has continued to abide by it in much later decisions.⁹³

B. Interpretation in the 1960's and 1970's

1. Liberalizing Trend in the 1960's

Despite the uncertainties and inconsistencies that characterized interpretation of section 9(b)(3) during the first fifteen years of its existence, the Kennedy and Johnson administrations ushered in a period of predictable outcomes as the Board and the federal courts liberally construed the statute on a regular basis. This liberalizing trend, however, did not do justice to the spirit behind section 9(b)(3); in fact, the zealotry throughout the 1960's to champion employee rights stifled, rather than advanced, the intent of the provision.⁹⁴

91. See generally *Inspiration Consol. Copper Co.*, 142 N.L.R.B. 53 (1963) (termination of organizational assistance by nonguard union did not show "affiliation"); *The Midvale Co.*, 114 N.L.R.B. 372 (1955) (use of nonguard union hall rent-free was not "affiliation"); *International Harvester Co.*, 81 N.L.R.B. 374 (1949) (mutual sympathy, common purpose and assistance not sufficient to find "affiliation").

92. See Cox, *supra* note 9, at 394. Cox had this to say about the Board's interpretation of the "indirect affiliation" term:

It is patently illogical for the Board to permit an "indirect affiliation" and prohibit a "direct affiliation" where "indirect affiliation" relationships have the same substance and ingredients as the typical "direct affiliation" relationship. The Board, by giving its blessing to a guard union-nonguard union marriage only where there has not been a ceremony, has encouraged such unions to do indirectly what they could not do directly.

Id. at 394-95.

93. See, e.g., *Bally's Park Place*, 257 N.L.R.B. 777 (1981); *Wells Fargo Guard Serv. Div. of Baker Protective Servs.*, 236 N.L.R.B. 1196 (1978); *The Wackenhut Corp.*, 223 N.L.R.B. 1131 (1976). There is some indication in more recent NLRB decisions, however, that suggests the Board is willing to find an "indirect affiliation" when assistance is less blatant. See, e.g., *Brink's Inc.*, 274 N.L.R.B. No. 144, 118 L.R.R.M. (BNA) 1409, 1410 (Mar. 14, 1985) (petitioning union "indirectly affiliated" with nonguard union based on fact that two unions had common officer and on fact that petitioner's only meeting was held at other union's facilities); *Alemite and Instrument Divisions of Stewart-Warner Corp.*, 273 N.L.R.B. No. 215, 118 L.R.R.M. (BNA) 1292, 1293 (Jan. 31, 1985) ("indirect affiliation" found because petitioning union's president was long-time friend of nonguard local officer and because nonguard union gave extensive assistance in preparing petition for Board hearing). Only time will tell whether these decisions herald a transformation in the Board's treatment of § 9(b)(3)'s "indirect affiliation" term.

94. To the extent that mixed unions were allowed access to certain Board processes during this period, the policy of the Board and the federal courts was not in harmony with § 9(b)(3)'s legislative intent. See generally *infra* notes 132-68 and accompanying text.

A 1961 Board decision later cited as controlling in one of the decade's most controversial opinions on point⁹⁵ was perceived, oddly enough, as being of no great significance. In *The William J. Burns International Detective Agency*,⁹⁶ more commonly known as *Burns I*, the Board ruled that application of traditional contract-bar rules was not contingent on whether the employer's contract was with a certifiable union.⁹⁷ The petitioning union in *Burns I*, along with another independent union, sought an election in a unit of guards, but the employer had a contract with the intervenor, Local 238, which was affiliated with a union admitting nonguards. Limited to the narrow facts of this case, the Board's decision to apply the contract-bar rules and thus dismiss the petition did not contravene the spirit of section 9(b)(3). Initially, this conclusion seems untenable in light of remarks made in the legislative history that protection of the Act was to extend to guards "only if they had a union separate and apart from the union of the general employees."⁹⁸ Yet merely because section 9(b)(3) was intended, in this sense, to act as a statutory deterrent to the formation of mixed unions does not mean that *Burns I* contradicts it. In the first place, Local 238 did not specifically seek protection under the Act or seek to invoke the Board's processes but instead sought only to avail itself of certain contract-bar rules, which are not statutorily mandated. Second, in its efforts to discourage both the existence of mixed unions and the inclination of mixed unions to pursue Board processes, Congress prohibited certification of these unions.⁹⁹ When

95. See *The William J. Burns Int'l Detective Agency*, 138 N.L.R.B. 449 (1962) [hereinafter cited as *Burns II*].

96. 134 N.L.R.B. 451 (1961) [hereinafter cited as *Burns I*].

97. *Id.* at 453. In so holding, the Board in *Burns I* stated the following:

[W]e perceive no basis in the instant case for withholding the application of our normal contract-bar rules. The application of these rules is not contingent on a prior certification. So long as there is a lawful exclusive bargaining agreement covering employees in an appropriate unit, the Board's contract-bar rules are applicable.

Id. This particular proposition was recently cited with approval by the Second Circuit in *Truck Drivers Local union No. 807 v. NLRB*, 755 F.2d 5, 10 (2d Cir.), *cert. denied*, 106 S. Ct. 225 (1985), a decision which enforced the Board's refusal to direct an employer to bargain with a mixed union despite prior voluntary recognition of that union by the employer. See *Wells Fargo Armored Serv. Corp.*, 270 N.L.R.B. 787 (1984). In *Truck Drivers No. 807*, the Second Circuit noted the following:

An employer who voluntarily recognizes a mixed union may not discontinue the relationship during the contract period. . . . The fact that employers have the option to recognize a mixed guard union voluntarily, however, does not require that the option be forever binding once accepted. *Mixed guard unions are appropriate only so long as an employer consents to recognize them.*

755 F.2d at 10 (emphasis added) (citations omitted).

98. 93 CONG. REC. 6445 (1947) (statement of Sen. Taft).

99. See 29 U.S.C. § 159(b)(3) (1982). In *Truck Drivers No. 807*, the Second Circuit found § 9(b)(3)'s prohibition on certification to be clear evidence of Congress' disfavor toward mixed unions. See 755 F.2d at 9. The court also posited that, through § 9(b)(3), "Congress knowingly decreased the stability of bargaining relationships in order to further its objective of protecting employers from the potential for divided loyalty." *Id.* at 10.

a guard unit, however, willingly takes the risk of affiliating with a nonguard union on the chance that an employer will voluntarily recognize it, section 9(b)(3) is not frustrated because statutory law has in no way been used to effect the union's end. Further, an employer's voluntary recognition of a mixed union gives rise to an inference that the risk of divided loyalties is either highly negligible or nonexistent. And even if the possibility exists, an employer accepts that risk by his decision to recognize the union. *Burns I*, for these reasons, is reconcilable with the spirit of section 9(b)(3).

The decision that self-purportedly followed the lead of *Burns I*, however, did not conform as adequately to congressional resolve. The 1962 opinion in *The William J. Burns International Detective Agency*,¹⁰⁰ referred to as *Burns II*, dealt with the same contract involved in *Burns I* between Local 238 and the employer, except that the agreement had since expired. The petitioning union desired an election to determine the bargaining representative of the guard unit, and Locals 238 and 177, though both affiliated with a union admitting nonguards, were allowed to participate in the hearing. After stating that it desired to be consistent with its decision in *Burns I*, the Board held that the statutory proscription in section 9(b)(3) against "certifying" mixed unions did not "prevent putting such labor organizations on the ballot, and certifying the arithmetical results when such an election is won by such organization."¹⁰¹ This ruling cited no Board precedent for its proposition and made no reference whatsoever to the legislative history of section 9(b)(3). The holding's most glaring fault by far, however, was that it emasculated the mechanism Congress created in section 9(b)(3) to discourage altogether the formation of these organizations by allowing the two mixed unions access to the Board's processes and also allowing them a place on the ballot and certification of the results if one was victorious. This distortion was the inevitable result of the Board's decision to read the statutory word "certify" literally rather than taking the effort to view it in the context of the overall legislative history and spirit of the provision.

Two years after the ruling in *Burns II*, the United States District Court for the Southern District of New York decided *Rock-Hill-Uris, Inc. v. McLeod*.¹⁰² The plaintiff employers in *Rock-Hill-Uris* sought to enjoin an election ordered by the Board's regional director because two uncertifiable mixed unions were to appear on the ballot. The court noted that the congressional purpose of section 9(b)(3) was to discourage mixed unions and thereby protect employers from being compelled by Board action to bargain with them.¹⁰³ The court also perceived that Congress foreclosed certification of

100. 138 N.L.R.B. 449 (1962).

101. *Id.* at 452.

102. 236 F. Supp. 395 (S.D.N.Y. 1964), *aff'd*, 344 F.2d 697 (2d Cir. 1965).

103. 236 F. Supp. at 397-98.

such unions in order to accomplish these objectives.¹⁰⁴ Nevertheless, the court permitted the two mixed unions to participate in the election on the chance that the arithmetical results would be certified if one should win.¹⁰⁵

Much like the Board in *Burns II*, then, the court in *Rock-Hill-Uri*s glossed over the fact that a possible effect of its ruling was to indirectly force the employers, "by Board action," to bargain with a mixed union if one was victorious. This was a result the court earlier admitted Congress intended to avoid.¹⁰⁶ Moreover, the emphasis placed on the Board's discretionary powers to order an election and thus assist the guards in their free choice of a bargaining representative was misdirected; the Board has no authority to practice its discretion in contravention of the congressional intent of section 9(b)(3). Yet by sanctioning the placement of mixed unions on an election ballot, the *Rock-Hill-Uri*s court permitted the Board to achieve indirectly through discretion what it was prohibited to do directly by the statute.¹⁰⁷ In professing to reach a result that conformed to legislative purpose as well as granted guard employees the fullest freedom of choice, the decision only furthered a distorted interpretation of section 9(b)(3)'s legislative history and spirit. Thus, the court's claim that the result of such an interpretation was to promote stable labor relations is not convincing.

2. Federal Court Trends in the 1970's

Federal court decisions in the 1970's refocused attention on some of the more fundamental purposes of section 9(b)(3).¹⁰⁸ In *NLRB v. Bel-Air Mart, Inc.*,¹⁰⁹ an often-cited 1974 case, the Fourth Circuit examined the statute in connection with section 8(a)(1)¹¹⁰ and section

104. *Id.* at 398.

105. *Id.*

106. See *supra* note 103 and accompanying text.

107. In *General Motors Corp.*, 77 N.L.R.B. 1029 (1948) and *Schenley Distilleries*, 77 N.L.R.B. 468 (1948), two cases cited by the *Rock-Hill-Uri*s court itself, the Board refused to process representation petitions because such action would directly contradict § 9(b)(3). See also *The University of Chicago*, 272 N.L.R.B. 873 (1984); *Brink's Inc.*, 272 N.L.R.B. 868 (1984); *Wells Fargo Armored Serv. Corp.*, 270 N.L.R.B. 787 (1984).

108. Many of the cases mentioned in this subsection of the Note, however, perpetuated the questionable tenets of *Armored Motor Serv. Co.*, 106 N.L.R.B. 1139 (1953), by considering armored truck drivers to be within § 9(b)(3)'s definition of "guard." See, e.g., *International Bhd. of Teamsters, Local 344 v. NLRB*, 568 F.2d 12 (7th Cir. 1978); *Squillacote v. International Bhd. of Teamsters, Local 344*, 561 F.2d 31 (7th Cir. 1977); *Drivers, Chauffeurs, Warehousemen and Helpers, No. 71 v. NLRB*, 553 F.2d 1368 (D.C. Cir. 1977); *Fuchs v. Teamsters Local Union No. 671*, 398 F. Supp. 243 (D. Conn. 1975); *Humphrey v. Drivers, Chauffeurs and Helpers Local 639*, 369 F. Supp. 730 (D. Md. 1974). For a discussion on the shortcomings of interpreting § 9(b)(3) in this fashion, see *infra* notes 186-202 and accompanying text.

109. 497 F.2d 322 (4th Cir. 1974).

110. See 29 U.S.C. § 158(a)(1) (1982). This provision declares that it is an unfair labor

8(a)(3)¹¹¹ violations by the employer, Bel-Air Mart. The company admitted to discharging one of its uniformed guards for attending certain union meetings but defended its action on the premise that the guard was not an "employee" under the Act and thus did not enjoy section 7 rights.¹¹² Reviewing the pertinent legislative history,¹¹³ the court concluded that the compromised version of section 9(b)(3) was designed to address the "divided loyalty" concern "while at the same time preserve the rights of guards under the NLRA."¹¹⁴ The Fourth Circuit continued by pointing out that the statute explicitly places limitations on Board powers, not upon the rights of employees.¹¹⁵ This is somewhat misleading because putting restrictions on the Board's authority to certify certain unions unavoidably imposes bounds on the rights of guards, albeit in an indirect fashion.¹¹⁶ The court understood this subtlety because, near the end of the opinion, it stated that employee rights protected by section 9(b)(3) have "little practical value aside from the rare instance when an employer voluntarily chooses to bargain with a union which could not be certified."¹¹⁷ This observation captures one of the key aspects of the congressional blueprint to discourage formation of mixed unions through the statute's prohibition on Board certification; that legislative design created a disincentive

practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." *Id.*

111. See 29 U.S.C. § 158(a)(3) (1982). Section 8(a)(3) declares, in part, that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.*

112. 497 F.2d at 328.

113. See H.R. REP. NO. 510, 80th Cong., 1st Sess. 35 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 539 (1948).

114. 497 F.2d at 326.

115. *Id.* at 327.

116. Under a "greater-includes-the-lessor" argument, § 9(b)(3)'s restrictions on the organizational rights of guard employees are not repugnant to § 7 of the NLRA. If Congress has the power to completely deny guard employees coverage of the federal labor laws, it likewise has the power to grant those employees only limited rights thereunder. See generally *infra* notes 142-46 and accompanying text.

117. 497 F.2d at 328. The court went on to say that "even though section 7 rights in this context may be of little value, the legislative history is that such rights were the intended product of compromise." *Id.* The Fourth Circuit in *Bel-Air Mart* drew heavily upon the Sixth Circuit's opinion in *NLRB v. White Superior Div., White Motor Corp.*, 404 F.2d 1100 (6th Cir. 1968), which was decided near the close of the 1960's. Many of the same observations made in *Bel-Air Mart* were first made in *White Superior*.

Recently, the Second Circuit in *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5 (2d Cir.), cert. denied, 106 S. Ct. 225 (1985), also perceived that, under § 9(b)(3), guard employees should have little or no incentive to seek out representation by a mixed union:

The proscription against certification of mixed guard unions . . . means that there is little sense in an employee remaining a member of such a union. A guard can adequately protect his rights, however, by joining a union separate from that of other employees. . . . Any diminution of [guards'] rights is not imposed by the Board, but rather is freely self-imposed by guards when they select a mixed guard union as their representative.

Id. at 10-11.

for mixed unions to so affiliate because the consequence of affiliation is the limitation of member employees' rights.¹¹⁸ Therefore, the *Bel-Air Mart* decision promoted the legislative purpose of section 9(b)(3).

During a seven-year span from 1971 to 1978, various federal courts issued opinions¹¹⁹ that scrutinized section 9(b)(3) in relation to alleged picket violations by mixed unions.¹²⁰ The biggest contribution made by these cases was in the arguments they advanced for strictly limiting the access of mixed unions to Board processes.¹²¹ In a majority of the cases, the Board and the respective employers argued that the NLRA's recognitional picketing statute contemplates filing a petition that raises a legitimate question of representation.¹²² The courts analyzed this position under section 9(c),¹²³ which grants the Board a wide degree of discretion in determining whether a true "question of representation" is present so as to warrant a Board-conducted election. The Court of Appeals for the District of Columbia in *General Service Employees Union Local No. 73 v. NLRB*,¹²⁴ for example, ruled that it was difficult to "find that a question of representation exists if the petitioner is disqualified from being certified as a representative."¹²⁵ In decisions dealing with this concept, the courts found the mixed unions'

118. In a key excerpt from *White Superior*, the Sixth Circuit characterized the disincentive function of § 9(b)(3):

In short, . . . the policy of § 9(b)(3) dictates that such membership [in a mixed union] not bestow all the benefits normally associated with belonging to a labor organization. Under these circumstances, *there would seem to be little sense in continued membership.*

404 F.2d at 1104 (emphasis added). Therefore, if a guard employee joins a mixed union, or if a guard union chooses to affiliate with a nonguard union, the strictures of § 9(b)(3) are voluntarily self-imposed and no one can be heard to complain. *See Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5, 11 (2d Cir.), *cert. denied*, 106 S. Ct. 225 (1985); *Drivers, Chauffeurs and Helpers Local 639*, 211 N.L.R.B. 687, 690 (1974).

119. *See General Serv. Employees Union Local No. 73 v. NLRB*, 578 F.2d 361 (D.C. Cir. 1978); *International Bhd. of Teamsters, Local 344 v. NLRB*, 568 F.2d 12 (7th Cir. 1978); *Squillacote v. International Bhd. of Teamsters, Local 344*, 561 F.2d 31 (7th Cir. 1977); *Drivers, Chauffeurs, Warehousemen and Helpers, No. 71 v. NLRB*, 553 F.2d 1368 (D.C. Cir. 1977); *Fuchs v. Teamsters Local Union No. 671*, 398 F. Supp. 243 (D. Conn. 1975); *Humphrey v. Drivers, Chauffeurs and Helpers Local 639*, 369 F. Supp. 730 (D. Md. 1974); *McLeod v. Security Guards and Watchmen Local Union No. 803*, 333 F. Supp. 768 (S.D.N.Y. 1971).

120. The alleged picket violations were analyzed under § 8(b)(7)(C) of the NLRA. *See 29 U.S.C. § 158(b)(7)(C)* (1982). That section makes picketing by a union in certain circumstances an unfair labor practice. *See id.*

121. The converse of limiting mixed unions in their access to Board processes is allowing liberal access, which would be inconsistent with Congress' explicit design to discourage the existence of these organizations by way of § 9(b)(3)'s mechanisms. *See generally infra* notes 133-40, 156-62 and accompanying text.

122. As the Court of Appeals for the District of Columbia posited in *Drivers, No. 71*, a "legitimate question of representation" is another way to say "a question that warrants the holding of an election, following which the petitioning union, if victorious, may be certified as the exclusive representative of employees." 553 F.2d at 1375.

123. *See 29 U.S.C. § 159(c)* (1982).

124. 578 F.2d 361 (D.C. Cir. 1978).

125. *Id.* at 371.

picketing contrary to the NLRA because the Board could properly use its discretion to dismiss a petition on the basis that no "question of representation" exists if the unions involved could not ultimately be certified.¹²⁶

The main contentions advanced on the unions' behalf in these decisions relied upon Board precedent and Supreme Court language asserting that certifiability is not a prerequisite for a Board-conducted election.¹²⁷ In *General Service*, the court emphasized that although the Board had in the past allowed noncertifiable unions to participate in elections and receive an arithmetical certification of the results,¹²⁸ it did not follow that "[a] union has any right to participate."¹²⁹ Likewise, in *Drivers, Chauffeurs, Warehousemen and Helpers, Local No. 71 v. NLRB*,¹³⁰ the Court of Appeals for the District of Columbia insisted that the Supreme Court decisions cited by the union did not detract from the Board's overall discretion:

Although the Union reads these cases to support its alleged right to a Board-conducted election, that reliance is misplaced. Fairly read, the cases establish, first, that in certain circumstances . . . the Board in its discretion will allow electoral participation by a nonqualifying union, and, second, that a reviewing court will sustain the Board's determination unless it constitutes an abuse of discretion. Cases involving the Board's refusal to order an election or to allow electoral participation illustrate the reverse factual situation, but the same legal principle of agency discretion.¹³¹

These various judicial confirmations of the NLRB's broad discretion allowed the Board to formulate anew its standards regarding the extent to which mixed unions are permitted to seek out Board processes.

III. THE RECENT BOARD DECISIONS

The election of Ronald Reagan in 1980 had an indirect impact on Board interpretation of 9(b)(3). As late as 1981, the NLRB and its holdover members

126. See, e.g., *McLeod v. Security Guards and Watchmen Local Union No. 803*, 333 F. Supp. 768, 771 (S.D.N.Y. 1971).

127. The judicial language depended upon by the unions came from the Supreme Court's rulings in *NLRB v. District 50, UMW*, 355 U.S. 453, 462 (1958) and *UMW v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 73 (1956).

128. The seminal case for this procedure is *Burns II*, 138 N.L.R.B. 449 (1962). See *supra* notes 100-01 and accompanying text.

129. 578 F.2d at 371 (emphasis original).

130. 553 F.2d 1368 (D.C. Cir. 1977).

131. *Id.* at 1376. The NLRB continues to find violations of § 8(b)(7)(C) when unqualified mixed unions attempt to picket. See, e.g., *Local 710, Int'l Bhd. of Teamsters*, 274 N.L.R.B. No. 142, 118 L.R.R.M. (BNA) 1514 (Mar. 14, 1985); *Local Union No. 803, Int'l Bhd. of Teamsters*, 274 N.L.R.B. No. 133, 118 L.R.R.M. (BNA) 1493 (Mar. 13, 1985).

remained loyal to procedures first outlined in *Burns II*.¹³² The new Republican influence, however, resulted in two 1984 decisions that, for the most part, brought Board policy closely in line with the legislative intent of section 9(b)(3).

A. *The University of Chicago Decision*

In *University of Chicago*,¹³³ the Board reevaluated the issue of whether a union disqualified from certification under section 9(b)(3) should be permitted to intervene in a Board-conducted election. This inquiry led to redefinition of the bounds placed on a mixed union's access to Board processes. In a representation election, the mixed union in question—Local 710—was allowed to appear on the ballot in accordance with the then-controlling decision in *Bally's Park Place*.¹³⁴ Drawing heavily on legislative history and case law that interpreted section 9(b)(3), the *University of Chicago* majority rejected established practice and ruled that mixed unions were thenceforth precluded from participation in elections;¹³⁵ this holding necessitated explicit overruling of *Burns II*, *Bally's Park Place* and the cases that later relied on those decisions.¹³⁶ Essential to the Board's conclusion was the majority's belief that section 9(b)(3) was passed for the express purpose of discouraging the existence of mixed unions and ensuring that employers were never compelled by Board action to bargain with them.¹³⁷ The majority, therefore, perceived a duty on its part not to read the "certification" language of the statute too literally¹³⁸ so that it would be free to practice its well-established

132. 138 N.L.R.B. 449 (1962). In 1981, the Board returned to the practice initiated in *Burns II* that allowed a mixed union intervenor to appear on the ballot for the purpose of certifying the arithmetic results if that union was able to win the election. See *Bally's Park Place, Inc.*, 257 N.L.R.B. 777 (1981). The *Bally's* decision revived the misguided notion that § 9(b)(3)'s "certification" is to be read literally. To so construe that language, however, ignores the intent of Congress to create a strong disincentive for the formation of mixed unions; the spirit of § 9(b)(3) dictates that when a union fails to recognize the disincentive function of the statute it cannot then avail itself of Board processes. See generally *infra* notes 133-40, 156-62 and accompanying text. By making the fatal choice to so affiliate, a mixed union is left only with the hope than an employer will extend to it voluntary recognition.

133. 272 N.L.R.B. 873 (1984).

134. 257 N.L.R.B. 777 (1981).

135. 272 N.L.R.B. at 876. Finding no valid distinction between a mixed union seeking participation as a petitioner and a mixed union desiring participation as an intervenor, the majority ruled to prohibit both from such participation in the future. *Id.* at 874. In so doing, the majority reiterated that the capacity in which a mixed union seeks participation in no way diminishes the threat of the "divided loyalty" situation. *Id.* at 875 n.23.

136. *Id.* at 876.

137. *Id.* at 875 & n.23. In adopting this interpretation, the majority was obviously influenced heavily by the decisions that emerged from the federal courts in the 1970's. See *supra* note 119.

138. See 272 N.L.R.B. at 876 n.25.

discretion¹³⁹ to forbid an election that, if held, would only serve to frustrate legislative intent.¹⁴⁰

Although Congress' "divided loyalty" concern received a relatively abridged treatment in the *University of Chicago* opinion, that concern did not go unheeded and was arguably one of the most important factors considered by the majority in its holding. Under the factual circumstances of the case, Local 710 was affiliated with a Teamsters union, and many of the employer's nonguard employees were represented by other Teamsters unions. In the event of a strike, the guards whom Local 710 sought to represent were responsible for monitoring the activities of those same Teamsters-affiliated workers. Consequently, the act of placing Local 710 on the ballot invited "the very 'divided loyalty' scenario which Congress intended to avert by its enactment of [section] 9(b)(3)."¹⁴¹ In so finding, the Board elevated the spirit of section 9(b)(3) above all else and ascertained that placement of Local 710 on the ballot would be wholly repugnant to that spirit.

Member Zimmerman in his dissent, however, took several positions contrary to the majority's accurate portrayal of the statute's purposes.¹⁴² Zimmerman's dissent was predominated by his belief that the majority, through a flawed interpretation of the provision, created an unacceptable conflict between section 9(b)(3) and section 7, the effect of which was to remove the exercise of fundamental rights from employees who wished to associate with a mixed union.¹⁴³ The statute's legislative history, as highlighted by the majority, militates against the contradiction that Zimmerman espoused. The

139. *Id.* at 874 n.8. The majority stated that the "determination of whether or not to place a noncertifiable union on a ballot in a Board-conducted election is clearly a discretionary Board action." *Id.* For this proposition, the majority cited to *General Serv. Employees Union Local No. 73 v. NLRB*, 578 F.2d 361 (D.C. Cir. 1978); *International Bhd. of Teamsters, Local 344 v. NLRB*, 568 F.2d 12 (7th Cir. 1978); *Drivers, Chauffeurs, Warehousemen and Helpers, No. 71 v. NLRB*, 553 F.2d 1368 (D.C. Cir. 1977).

140. The one aspect of allowing a mixed union to appear on the ballot that most concerned the majority was the misconception that such an action imparted:

Clearly, this practice creates the false impression that the guard-nonguard union is equally capable of securing the protections of the Act as other candidates on the same ballot . . . [and] we shall not, indeed cannot, sanction a practice which utilizes Board processes in furtherance of an end which a specific provision of the Act was plainly intended to discourage.

272 N.L.R.B. at 876.

141. *Id.* at 875 n.17.

142. The majority took the position that the two main purposes of § 9(b)(3) were 1) to discourage the existence of mixed unions, and 2) to ensure that an employer is never compelled by Board action to bargain with these labor organizations. *See supra* note 137 and accompanying text.

143. 272 N.L.R.B. at 877. Zimmerman asserted that the majority's interpretation in this regard "diminished the employees' Section 7 rights to choose or reject collective-bargaining representation—the cardinal tenet which the Act mandates and which the Board is assigned to effectuate in administering the Act." *Id.* at 878.

House version of the Act¹⁴⁴ sought to completely exclude guards from coverage of the NLRA, but the final form of the measure compromised that position to allow these employees protection under section 7 within certain confines.¹⁴⁵ Under this scheme, guards have no right to be members of a unit that includes nonguards, and, further, guards banded together in a mixed union have no right to seek Board certification. If Congress has the absolute power to deny guards protection under the Act, it likewise has the power to grant coverage yet place restrictions on those rights in certain circumstances. Read this way, section 9(b)(3) and section 7 are compatible, not contradictory as asserted in the dissent.¹⁴⁶

Zimmerman's opinion also insisted erroneously on a strict interpretation of section 9(b)(3)'s "certification" language. Zimmerman posited that a narrow construction of the statute's wording was required because of the perceived incongruity between that language and the statute's purpose.¹⁴⁷ In other words, Zimmerman believed that if Congress had intended to prohibit more than just Board certification of mixed unions, it would have made that intention clear in section 9(b)(3)'s language rather than settling for the unadorned word "certify."¹⁴⁸ Zimmerman therefore took the position that the Board's processes should be used freely by mixed unions for any purpose short of certification because nothing in the statute prohibits the Board from assisting guard employees in their free choice of a bargaining representative.¹⁴⁹ This reasoning disregards Congress' desire to discourage the formation of mixed unions through the statute's prohibition on certification. If a particular mixed union fails to respond to the disincentive function that the word "certify" was to serve, then, the Board—to keep within the spirit of section 9(b)(3)—should avoid action that would foster the continued existence of such an organization. Thus, the Board should not allow a mixed union on

144. See generally H.R. 3020, 80th Cong., 1st Sess. (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 158-225 (1948).

145. See *supra* note 7. The remarks of Senator Taft on the final version of § 9(b)(3) are pertinent here:

We compromised with the House by providing that [plant guards] should have protection of the [NLRA], but in a separate unit from the workers in the plants. That is certainly a change—although a minor one—and certainly it is a compromise with the extreme position taken by the House.

93 CONG. REC. 6499 (1947).

146. See 272 N.L.R.B. at 876 n.25 (majority's argument that § 9(b)(3) and § 7 are compatible).

147. *Id.* at 879.

148. *Id.* Zimmerman stated that

Congress was fully aware of the problems underlying enactment of Section 9(b)(3) and had the opportunity, if it wished to do so, to prohibit not only the certification of a guard-nonguard union but also its status as the potential collective-bargaining representative of a unit of guard employees. It chose not to do so, opting only to prohibit the Board from finding a unit of guard and nonguard employees to be appropriate and from *certifying* a guard-nonguard union.

Id. (emphasis original).

149. *Id.* at 877-78.

the ballot when doing so, as here, would give rise to the "divided loyalty" predicament Congress meant to evade.¹⁵⁰ Further, even if the Board is *not prohibited* from placing a mixed union on the ballot, nothing *requires* the Board to take such steps.¹⁵¹

The *University of Chicago* majority, then, arrived at a construction of section 9(b)(3) which logically and accurately depicted the statute's legislative intent. This result was the foreseeable culmination of a process begun five months earlier in *Wells Fargo Armored Service Corp.*¹⁵² The *Wells Fargo* Board ruled, with one member strongly dissenting,¹⁵³ that the respondent employer did not commit an unfair labor practice by abandoning its voluntary bargaining relationship with a mixed union.¹⁵⁴ The employer in *Wells Fargo* withdrew recognition from the mixed union only after expiration of the contract, and the Board upheld that action because it believed too literal a reading of the statute's "certification" language thwarted congressional purpose to the extent that such a construction would compel the employer to bargain with the union.¹⁵⁵ The foundations of *Wells Fargo* thus created an opportunity to extend the propositions advanced in that opinion and eliminate for good any belief that the Board sanctioned the existence of mixed

150. See *supra* note 141 and accompanying text.

151. See *Drivers, Chauffeurs, Warehousemen and Helpers, Local 71 v. NLRB*, 553 F.2d 1368, 1376 (D.C. Cir. 1977); see also *supra* notes 127-31 and accompanying text.

152. 270 N.L.R.B. 787 (1984), *enfd sub nom. Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5 (2d Cir.), *cert. denied*, 106 S. Ct. 225 (1985). Board Chairman Dotson and Members Hunter and Dennis represented the majority in the *Wells Fargo* decision and Member Zimmerman dissented. This was the same alignment that prevailed for both the *University of Chicago* opinion and its companion case, *Brink's Inc.*, 272 N.L.R.B. 868 (1984).

153. The *Wells Fargo* decision reversed the finding of an administrative law judge that the employer, by withdrawing recognition from a mixed union at the end of a contractual period, violated §§ 8(a)(1) and 8(a)(5), the latter of which makes it an unfair labor practice for an employer to refuse to bargain with a representative of its employees. See 270 N.L.R.B. at 787; see also 29 U.S.C. § 158(a)(5) (1982).

154. 270 N.L.R.B. at 789. The majority's argument in *Wells Fargo* rested on the premise that to force an employer to maintain a voluntary bargaining relationship with a mixed union "gives the Union indirectly—by a bargaining order—what it could not obtain directly—by certification—i.e., it compels the [employer] to bargain with the Union." *Id.* at 787.

155. *Id.* at 789. The majority in *Wells Fargo* addressed the major problem presented by reading § 9(b)(3)'s "certification" language too literally:

[The] potential conflict of loyalties exists whether a mixed guard union is certified or not. Viewed in this light, there is no basis for the Board's drawing a distinction between initial certification and, as here, the compulsory maintenance of a bargaining relationship through the use of a bargaining order. In either case, saddling the employer with an obligation to bargain presents it with the same set of difficulties and the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid.

Id. Consistent with this notion, the Second Circuit stated the following when it ruled to enforce the *Wells Fargo* decision:

Employers may choose at the outset not to rely on the strictures that Congress enacted for their benefit, but the policy concerns inherent in [§ 9(b)(3)] require that employers have the right to rely on it at some later point.

Truck Drivers No. 807, 755 F.2d at 10.

unions. The opportunity was seized upon in the *University of Chicago* opinion and subsequently followed up by the Board in that decision's companion case.

B. *The Brink's Inc. Decision*

In addition to filing a petition for representation, the mixed union in *Brink's Inc.*¹⁵⁶ also submitted a unit clarification petition to add two coin-room employees to an all-guard unit that had been voluntarily recognized by the employer since 1969. Originally, a Regional Director of the Board ordered an election after determining that the coin-room employees were not "guards" under section 9(b)(3). On the basis of that conclusion, he dismissed the unit clarification petition.¹⁵⁷ The Board, however, found that the employees were "guards" within the meaning of the statute and consequently considered both petitions.¹⁵⁸ In a very terse manner, the majority dismissed the representation petition on the ground that the Board was proscribed by the statute from certifying the mixed union.¹⁵⁹ The majority invoked section 9(b)(3) again when it refused to reinstate the unit clarification petition because granting that petition would have assisted the mixed union in "accomplishing or perfecting that which the statute expressly seeks to avoid, i.e., the representation of guard employees by a union which admits to membership employees other than guards."¹⁶⁰ Although it acknowledged that a mixed union had the right to attempt to secure voluntary recognition

156. 272 N.L.R.B. 868 (1984).

157. Based upon the determination that the coin-room employees were not "guards" under the statute, the Regional Director was thus required by § 9(b)(3) to dismiss the clarification petition; to place nonguards in an appropriate guard unit would violate the statute's explicit prohibition against mixed units. See 29 U.S.C. § 159(b)(3) (1982).

158. *Brink's*, 272 N.L.R.B. at 869. In determining that the coin-room employees were "guards" under § 9(b)(3), the Board noted that employees who protect their employer's own property are not the only group that falls within the "guard" definition. *Id.* (citing *Brink's Inc.*, 226 N.L.R.B. 1182, 1183 (1976)). This was important in that the employees in question processed coin bags belonging to their employer's customers as they worked out of the Brink's secured facility in Columbus, Ohio. Because the value of the coins in the processing room at any given time exceeded \$1 million, and because the employees controlled access to the room and had the authority to fire a pistol if necessary, the Board found them to be "guards" for purposes of § 9(b)(3). *Brink's*, 272 N.L.R.B. at 868-69. The Board's depiction here did not run awry of the traditional plant guard-"contract guard" criteria because the employees in question performed conventional guard-like duties throughout the duration of their working day. Thus, that depiction avoided adding to the controversy surrounding the status of armored truck guards under § 9(b)(3). See *infra* notes 186-201 and accompanying text.

159. *Brink's*, 272 N.L.R.B. at 869. The mixed union in *Brink's* was a petitioner and not an intervenor, as was the mixed union in *University of Chicago*. The issues posed by an intervenor seeking a place on the ballot and certification of arithmetical results, therefore, were not present in *Brink's*, and the Board was able to summarily dismiss the petition under § 9(b)(3). In his dissent, Member Zimmerman admitted that dismissal of the representation petition was appropriate but disagreed with the majority's stance on the unit clarification petition. *Id.* at 870.

160. *Id.* at 870.

by an employer, the majority nonetheless declined to permit the Board's processes to be used to further that end.¹⁶¹ By strictly limiting a mixed union's access to the Board and construing broadly section 9(b)(3)'s "certification" language,¹⁶² the *Brink's* decision paralleled the logical reasoning of the *University of Chicago* opinion.

In *Brink's*, Member Zimmerman was again the lone dissenter. This case gave him another opportunity to push for a narrow construction of the statute's "certification" language.¹⁶³ Zimmerman also argued that the majority's refusal to permit an accretion of the two guards to the existing, voluntarily recognized guard unit undermined the stability of the parties' fifteen-year-old bargaining relationship—especially when the employer was not attacking that relationship.¹⁶⁴ At first glance, this contention appears to have merit, but, upon closer examination, is easily understood as short-sighted.

Allowing the two employees to be part of the established guard unit is arguably consistent with case law that recognizes the right of guards in a mixed union to seek the voluntary recognition of their employer.¹⁶⁵ An accretion in these circumstances would merely place the two employees in the same position as other guards enjoying the benefits of the employer's voluntary recognition. The pitfall of arguing for addition of the two employees to the unit, however, is that it assumes the employer will *continue* to recognize the mixed union in the future. Under the Board's holding in *Wells Fargo Armored Service Corp.*,¹⁶⁶ the employer in the instant case could lawfully withdraw recognition of the guard unit upon expiration of the parties' mutual contract. Zimmerman's argument to permit the accretion, then, failed to note the unstable nature of the guard unit. The majority's position in *Brink's*, on the other hand, better promoted long-term stability at the employer's workplace because it did not foster the false impression

161. *Id.*

162. *Id.* Near the very close of its opinion, the *Brink's* majority commented that to process the petition "in the face of the prohibitions in Section 9(b)(3) would . . . place an unduly narrow interpretation on the legislative intent expressed by that provision." *Id.*

163. *See id.* at 870-72.

164. *Id.* at 872.

165. *See, e.g.,* Truck Drivers Local Union No. 807 v. NLRB, 755 F.2d 5, 10 (2d Cir.), *cert. denied*, 106 S. Ct. 225 (1985); NLRB v. White Superior Div., White Motor Corp., 404 F.2d 1100, 1103 (6th Cir. 1968). In *Truck Drivers No. 807*, the Second Circuit noted the following:

The fact that employers have the option to recognize a mixed guard union voluntarily, however, does not require that the option be forever binding once accepted. Mixed guard unions are appropriate only so long as an employer consents to recognize them.

755 F.2d at 10.

166. 270 N.L.R.B. 787 (1984), *enf'd sub nom.* Truck Drivers Local Union No. 807 v. NLRB, 755 F.2d 5 (2d Cir.), *cert. denied*, 106 S. Ct. 225 (1985). *See supra* notes 152-55 and accompanying text.

that the voluntary bargaining relationship would continue ad infinitum.¹⁶⁷ Though the effects of the ruling were initially harsh on the two coin-room employees who sought accretion, the Board's denial of the petition will force employees in future years to seek out representatives capable of securing the bargaining stability that the Act was intended to provide.¹⁶⁸ In addition, the majority's position was more consistent with section 9(b)(3)'s purpose to discourage formation of mixed unions because it intensified the statutory disincentive. By taking a realistic and forward-looking stance on the accretion issue, the majority in *Brink's* helped to advance stability in this realm of labor relations.

The holding in *Brink's*, then, meshed with the Board's companion ruling in *University of Chicago*. Both cases went far to clarify major congressional considerations that led to passage of section 9(b)(3) and thereby were able to reach a logical construction of the provision's legislative intent. Not all possible aspects of the statute were analyzed by these decisions, however, and there remain other considerations that enter into the overall interpretation and modern-day applicability of section 9(b)(3).

IV. THE MODERN-DAY REALITIES

Gleaning the true legislative intent from section 9(b)(3) is merely the initial step in a broader analysis of the statute. The next and perhaps more crucial step is to examine section 9(b)(3) in a modern-day context. As alluded to previously in this Note, the Taft-Hartley Act emerged from Congress during an era marked by the turbulence and instability of the postwar years.¹⁶⁹ The passage of nearly forty years has changed the outlooks and perceptions that once prevailed in the realm of labor relations. Due to the transformations of time, then, a brief investigation into the current realities of the workplace is essential.

167. Cf. *University of Chicago*, 272 N.L.R.B. at 876. Referring to its decision in both *Brink's* and *University of Chicago*, the Board stated that

it can scarcely be gainsaid that placing a guard-nonguard union on the ballot contributes to a result antithetical to the legislative history of Section 9(b)(3). Clearly, this practice creates the false impression that the guard-nonguard union is equally as capable of securing the protections of the Act as other candidates on the same ballot. As we noted in *Brink's*, . . . we shall not, indeed cannot, sanction a practice which utilizes Board processes in furtherance of an end which a specific provision of the Act was plainly intended to discourage.

Id.

168. The Board's decisions in *Wells Fargo*, *Brink's*, and *University of Chicago* sent an explicit message to guard employees that the only way to assure long-term bargaining stability in the workplace is to be affiliated with an independent, all-guard union.

169. See *supra* notes 14-44 and accompanying text.

A. Union Response to the Statute's Disincentive Function

Congress intended that section 9(b)(3) discourage the formation of mixed unions.¹⁷⁰ To effect that end, lawmakers included the "certification" language to operate as a disincentive for unions to affiliate in this manner. One commentator argued persuasively that the intended by-product of the statute's disincentive function was "to require and promote the growth of independent guard unions to represent guards exclusively."¹⁷¹ Unfortunately, the size and strength of independent, all-guard unions simply have not increased. In relatively recent figures compiled by the United States Labor Department, independent plant guard unions represented a small percentage of those employed to perform plant-protection services.¹⁷² The reason for this lack of success apparently "rests upon the inherently weak bargaining strength of plant-guard unions separated from established labor organizations."¹⁷³ A lack of bargaining strength on the part of all-guard unions is

170. See, e.g., *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5, 9-10 (2d Cir.), cert. denied, 106 S. Ct. 225 (1985); *NLRB v. Bel-Air Mart*, 497 F.2d 322, 325-27 (4th Cir. 1974).

171. See Cox, *supra* note 9, at 393.

172. The Labor Department's Bureau of Labor Statistics has not published a directory of national unions and employee associations since 1979. In the 1979 statistical compilation, six independent, all-guard unions represented approximately 37,000 employees spread over 239 local unions. See 1979 U.S. DEP'T OF LABOR, BUREAU OF STATISTICS, *DIRECTORY OF NAT'L UNIONS AND EMPLOYEE ASS'NS*, 21-49. This membership level constituted only around seven percent of those employed as guards that year. See 1980-81 U.S. DEP'T OF LABOR, BUREAU OF STATISTICS, *OCCUPATIONAL OUTLOOK HANDBOOK* 160 (1978 figure placed at 550,000 guard employees); 1982-83 U.S. DEP'T OF LABOR, BUREAU OF STATISTICS, *OCCUPATIONAL OUTLOOK HANDBOOK* 285 (1980 figure quoted at 650,000 guard employees).

173. B. TAYLOR & F. WITNEY, *supra* note 14, at 364. During committee hearings on the Labor Reform Act of 1977, see *supra* note 24, several expert witnesses from the field of protection and security services testified to the undesirable effects of guard employees' inferior bargaining power, which is exacerbated by, if not the direct result of, the separation of guard unions from stronger, nonguard labor organizations. One union organizer noted that "[s]ecurity is a misnomer for guards who are forced to work for minimum wages, few benefits and little say in the conditions of their employment." *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources on S. 1883 to Amend the National Labor Relations Act to Strengthen Remedies and Expedite the Procedures Under Such Act*, 95th Cong., 1st Sess. 1288 (1977) (statement of John Geagan, General Organizer, Service Employees International Union, AFL-CIO) [hereinafter cited as *Hearings on S. 1883*]. One high-level management witness whose guard employees were represented by the Teamsters, a nonguard organization, testified that guards elsewhere in the industry—whether members of all-guard unions or unaffiliated—were clearly being paid substandard wages. *Id.* at 577 (testimony of Russell Silvers, Vice President, Brink's, Inc.); cf. *id.* at 1324-34 (transcript from CBS 60 Minutes broadcast entitled "On Guard") (well-trained guards difficult to procure due to low pay of private security industry, employees of which are among "lowest form of American labor" despite their weighty responsibilities).

The testimony of one other witness highlighted in a masterful way the prevailing conditions in the security industry:

I have sat in the office of many presidents of large corporations and looked the president in the eye and advised him when he was complaining about his

a concern because section 9(b)(3) is directly responsible, by its very design and purpose, for the separation of these unions from stronger, more experienced nonguard unions.

The distinct possibility also exists that all-guard unions have been weakened, in an indirect manner, by the controversy that has surrounded interpretation of section 9(b)(3). Inconsistent rulings and fluctuating policies may have together caused ambivalent responses to the disincentive function of the statute by making unclear to unions and guard employees alike the ramifications of their affiliation choices. If that is the case, a statutory amendment may be required to end ambiguities and clarify more exactly those situations in which guard employees must seek out an all-guard union. Going to the other extreme, an in-depth investigation of the problem may show that the only way to bolster the bargaining strength of guard employees is to repeal the statute. Repeal would necessitate a balancing of the "divided loyalty" concern against the desire to provide guard employees with bargaining strength and, subsequently, a determination that the latter policy is more compelling. Whatever the end result, the need for reappraisal is evident, and the Board's two rulings on the statute in 1984¹⁷⁴ provide a starting point from which to begin this new inquiry.

B. The "Divided Loyalty" Concern

As made clear in the legislative history of the Act, Congress' "divided loyalty" concern was the major impetus for passage of section 9(b)(3).¹⁷⁵ The potential for a division of loyalties allegedly presents itself when guards are subject to "organizational domination and discipline by those whom it may be their duty to apprehend and report to management."¹⁷⁶ From the day the Taft-Hartley Act was passed to the present, neither the Board nor the federal courts have questioned the premise that this potential existed; the proposition has always been accepted as a given fact of the workplace. The "divided loyalty" scenario, however, was never perceived as a problem prior to enactment of the legislation. Even when the nation was in the throes of World War II, the Board analyzed all the applicable policy considerations and concluded that allowing guards to freely choose a bargaining representative posed no particular threat to stable labor relations.¹⁷⁷ Addressing

security problems that he pays more for a janitor to empty his ashtray, clean out his garbage, and sweep the floor, than the man who he trusts with a \$1-million plant while he is not on the premises.

Id. at 568 (testimony of Frank Baum, Vice President, Wallace Security Agency, Inc.).

174. See *The University of Chicago*, 272 N.L.R.B. 873 (1984); *Brink's Inc.*, 272 N.L.R.B. 868 (1984). For a discussion of these two decisions, see *supra* notes 133-68 and accompanying text.

175. See *supra* notes 34-44 and accompanying text.

176. See *Cox*, *supra* note 9, at 393.

177. See *supra* notes 30-31.

the issue in *NLRB v. Jones & Laughlin Steel Corp.*,¹⁷⁸ the United States Supreme Court dismissed the concern as unwarranted because the collective bargaining process was "flexible enough to allow for the increased responsibilities placed upon the militarized guards."¹⁷⁹

If the "divided loyalty" concern proves to be a nullity, section 9(b)(3) could be vulnerable to attack on constitutional grounds via the reasoning advanced in *International Brotherhood of Teamsters, Local 344 v. NLRB*.¹⁸⁰ The Seventh Circuit in that case ruled 3-0 that the NLRB did not abuse its discretion in refusing to conduct an election for a union which was non-certifiable under the strictures of section 9(b)(3).¹⁸¹ In addition to challenging the Board's discretion, however, the petitioning union asserted that section 9(b)(3), as interpreted, violated its and the employees' first amendment right to freedom of association because the statute penalized guard employees for choosing to associate with nonguards.¹⁸² In rejecting this argument, the Seventh Circuit balanced the public interest served by section 9(b)(3) against the infringement on the union's and employees' rights and decided that the "divided loyalty" concern was indeed "substantial."¹⁸³ The infringement caused by the statute, on the other hand, was characterized by the court as "incidental and minimal" and thus constitutional.¹⁸⁴ Taking this logic to its end, the infringement on rights—though deemed "minimal" in *Teamsters, Local 344*—could possibly be found unconstitutional when balanced against a "divided loyalty" concern that is subsequently determined to be of no true concern at all. The concept of "divided loyalty," therefore, is in need of reassessment to assure that modern working conditions have not lessened its compelling nature.

178. 331 U.S. 416 (1947).

179. *Id.* at 424.

180. 568 F.2d 12 (7th Cir. 1978).

181. *Id.* at 17. In so ruling, the court cited *Drivers, Chauffeurs, Warehousemen and Helpers, Local 71 v. NLRB*, 553 F.2d 1368 (D.C. Cir. 1977), for the proposition that the Board need not call an election when a noncertifiable union seeks one. *Teamsters, Local 344*, 568 F.2d at 15.

182. *Teamsters, Local 344*, 568 F.2d at 19-20. The union also argued that § 9(b)(3) violated the "substantive due process" rights of guard employees under the fifth amendment, but the court determined that the claim was lacking in foundation. *Id.* at 20 n.18.

183. *Id.* at 20.

184. *Id.* The court summarized the infringement of rights in a succinct and convincing manner: Nothing restricts the guards' rights to join the Union, to associate with non-guards or even to receive voluntary bargaining rights. All that is deprived is certification and a Board-conducted election. Balanced against the public policy served by [§ 9(b)(3)], we find there is too insubstantial an infringement on the Union's and employees' rights to justify holding this provision to be violative of the [C]onstitution.

Id. at 20-21. See also *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5, 11 (2d Cir.), cert. denied, 106 S. Ct. 225 (1985) (diminution of rights freely self-imposed by guards who choose to affiliate with mixed union); *Brennan v. Koch*, 564 F. Supp. 322, 326 (S.D.N.Y. 1983) (public interest behind New York City administrative statute similar to § 9(b)(3) outweighs "minimal" infringement on plaintiffs' associational rights).

Even if the "divided loyalty" concern is valid, some other ways may exist to guarantee that conflicting obligations are avoided in the workplace without resort to the organizational proscriptions of section 9(b)(3). One possible way would be to encourage employers to negotiate aggressively for a clause in contracts with mixed unions that would allow guard employees to continue their protection duties notwithstanding union strike activity. Another way would be for Congress to pass measures prohibiting mixed unions from disciplining guard members who fulfill their obligations to an employer while other fellow union employees are engaged in some form of collective activity. If the fear of monetary retribution by unions is removed, guard employees are likely to have little or no aversion to performing their job obligations. Further, employers could be given freedom under the labor laws to immediately discharge guard employees who prove disloyal, inefficient or remiss in carrying out their duties.¹⁸⁵ Such considerations represent a legitimate basis for reappraisal of the statute's applicability in current times.

C. The Expanded "Guard" Definition

The expansion of the "guard" definition is by far the most pressing consideration in analyzing the modern-day applicability of section 9(b)(3). Interpreting the definition so as to include traditional plant guards and "contract guards" is supported by the legislative history, but, as discussed previously, extending the terminology to cover armored truck guards is much more suspect.¹⁸⁶ Unquestioned deference by the NLRB and the federal courts to the 1953 Board decision in *Armored Motor Service Co.*¹⁸⁷ is misplaced and necessitates renewed analysis of the issue.

The rationale advanced in *Armored Motor* for the extension of the definition to armored truck guards was that the danger of divided loyalties could present itself when guards were called upon to deliver money or valuables to a customer whose employees were represented by the same union as the guards and, at the time of the delivery, those employees were on strike picketing the premises of the customer.¹⁸⁸ The Board in *Armored Motor*—at least implicitly—was concerned only about armored truck guards who refuse to cross a picket line and fulfill their duties. The need for concern under these circumstances, when compared to the potential for divided loyalties in the context of plant guards and "contract guards," is negligible. While on the job, traditional plant guards and "contract guards" perform more pressing, on-going security duties than do armored truck guards. The two former classes of guard employees are charged with enforcing an em-

185. See B. TAYLOR & F. WITNEY, *supra* note 14, at 365.

186. See *supra* notes 48-78 and accompanying text.

187. 106 N.L.R.B. 1139 (1953).

188. *Id.* at 1140.

ployer's rules "against employees and other persons" or with protecting "the safety of other persons on [an] employer's premises,"¹⁸⁹ either of which must be performed every minute of the guards' working-time day.¹⁹⁰ Armored truck guards, however, spend a considerable amount of their working day transporting money and valuables from place to place and very little time actually at a customer's business facilities. In other words, the "divided loyalty" concern presents itself on a continuous basis when dealing with traditional guards and "contract guards"¹⁹¹ but arises sporadically in the situation presented by armored truck guards.¹⁹² The duties of this latter guard classification, then, are not a valid premise upon which to rest a "divided loyalty" concern.¹⁹³

Moreover, there is some question whether armored truck guards even have the authority to enforce a customer's rules against his employees or whether these guards have a duty to protect the safety of persons on a customer's

189. These criteria for determining "guard" status for purposes of § 9(b)(3) are contained in the statute itself. See 29 U.S.C. § 159(b)(3) (1982).

190. Both traditional plant guards and "contract guards" are known to conduct these duties on an industry-wide basis and thus fall squarely within the literal wording of § 9(b)(3). See, e.g., *Hearings on S. 1883*, *supra* note 173, at 1707-10 (testimony of Donald Janis, Vice President-Secretary, Burns International Security Services, Inc.).

191. The "divided loyalty" concern can arise in any number of situations when dealing with traditional plant guards and "contract guards" because these employees are constantly supervising the conduct of nonguard employees to protect against violations of an employer's workplace rules, not just when those nonguard employees go out on strike or otherwise engage in collective activity. In *Armored Motor*, 106 N.L.R.B. at 1140, the only example the Board mustered to highlight the "divided loyalty" concern with regard to armored truck guards was that of a strike by nonguard employees on the customer's premises.

192. One witness representing the management of armored services at the hearings on the Labor Reform Act of 1977, see *supra* notes 24 & 173, argued that the "divided loyalty" concern was as compelling in the context of armored truck guards as in that of other guards. See *Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor on H.R. 8410 to Amend the National Labor Relations Act to Strengthen Remedies and Expedite Procedures*, 95th Cong., 1st Sess. 493-94 (1977) (statement of William Cole, Senior Vice President, Wells Fargo Armored Service Corp.). But that position was brought into question by the testimony of Russell Silvers, an executive of Brink's Inc. See *Hearings on S. 1883*, *supra* note 173, at 577-600. In his testimony, Silvers vigorously supported a distinction between armored truck guards and other guards so that the former group would be deemed to fall outside the purview of § 9(b)(3). At the time of the hearings, Brink's Inc. had been recognizing the Teamsters, a nonguard union, on a voluntary basis as the representative of its guard employees since 1948, notwithstanding the strictures of § 9(b)(3) and the Board's 1953 *Armored Motor* decision. At no point in his testimony did Silvers intimate that the Teamster affiliation of Brink's armored truck guards had caused any substantial problems as far as conflicting obligations were concerned.

193. The counter to this argument is that the legislative history and spirit of § 9(b)(3) do not indicate that the "divided loyalty" concern is to be perceived of as existing in different degrees, deserving of different treatment. Due to the extreme consequences that a far-reaching "guard" definition could have on the organizational rights of employees in everyday occupations, however, policy considerations along these lines may be dictated. See, e.g., *infra* note 196 and accompanying text.

premises.¹⁹⁴ For this very reason, one commentator posited that it "requires a great stretch of the imagination to read [section 9(b)(3)] as applying to armored car and express delivery drivers and employees."¹⁹⁵ The biggest problem with the expansion of the "guard" definition, though, is that there is virtually no end to the everyday occupations it could be found to encompass. The criteria for establishing "guard" status under section 9(b)(3), as they now stand, threaten such diverse nonguard jobs as those held by truck drivers, postal workers, deliverymen and parking-garage attendants.¹⁹⁶ Employees in these occupations and numerous others most often have responsibilities to protect the property of their employers or of their customers; in this way, their duties are similar to those of armored truck drivers. One vivid example of this proposition is the case of an ordinary truck driver, who, during any given assignment, may be responsible for transporting and protecting cargo worth considerably more than money and valuables delivered by the average armored truck guard. Yet there are no restrictions placed on the ordinary truck driver in his choice of bargaining representative, even though he is likely in the course of his duties to come into frequent contact with fellow union employees.

Furthermore, an interpretation placing armored truck guards outside the scope of section 9(b)(3)'s "guard" definition would not eviscerate an employer's legitimate right to demand loyalty from his employees. Under an extension of the Board's reasoning in *Redwing Carriers, Inc.*,¹⁹⁷ an employer could bring economic pressure to bear on armored truck drivers who refuse to cross a strike picket set up by fellow union employees on the premises of a customer. In *Redwing*, eight truck drivers permanently assigned by the employer to make deliveries to another company would not cross a picket at that company; the employer subsequently terminated their services. The truck drivers maintained that their dismissal was an unfair labor practice, but the Board ruled that, when an employer acts to preserve efficient operation of his business, he is justified in terminating any employee who refuses to cross a picket line.¹⁹⁸ Faced with an armored truck guard who refuses to cross a picket at a customer's place of business, an employer

194. Cf. *Philadelphia Co. and Associated Cos.*, 84 N.L.R.B. 115 (1949). In *Philadelphia Co.*, the employees in question were responsible for collecting and transporting fare receipts from the employer's streetcars. The Board found the fact that the employees were not responsible for enforcing any of the employer's rules a persuasive factor in deciding that the employees were not "guards" within the meaning of § 9(b)(3). *Id.* at 118. Curiously enough, the *Armored Motor* opinion neither cited to, distinguished, nor overruled the Board's decision in *Philadelphia Co.*; one commentator viewed this as inexplicable. See Kahn, *supra* note 8, at 338-39.

195. See Kahn, *supra* note 8, at 334.

196. *Id.* at 328.

197. 137 N.L.R.B. 1545 (1962), *enfd sub nom.* Teamsters, Local Union No. 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

198. *Redwing*, 137 N.L.R.B. at 1548.

could simply replace that guard, perhaps permanently.¹⁹⁹ Presented with the choice of being replaced or incurring the discipline of his union, the armored truck guard would be expected to choose the latter; thus, the danger of divided loyalties would arise on an infrequent basis.

In light of the foregoing considerations, substantial justifications exist for narrowing the definition of "guard" under section 9(b)(3). One commentator argued convincingly that the test for "guard" status should be "whether an employee *functions* as a plant guard."²⁰⁰ Under this standard, traditional plant guards and "contract guards" would be within the statutory definition, but the armored truck guards would fall outside the provision because their duties are dissimilar to those of the former two classes. Incorporation of this distinction by way of statutory amendment would help delineate more clearly the boundaries of the definition.²⁰¹ Now that other aspects of section

199. Two authors have taken the position that, because guards in general perform tasks that can easily be learned by new employees in a short time, replacement of a guard under these circumstances would present an employer with no great inconvenience. See B. TAYLOR & F. WITNEY, *supra* note 14, at 364. There is reason, however, to question whether this is always the case. While some employers have taken the stance that there is little difficulty in finding dependable, quality guard employees, others have questioned the skills and trustworthiness of those who are hired. This skepticism is bred in greatest part by the security industry's low-pay standards. See, e.g., *Hearings on S. 1883, supra* note 173, at 1324-34 (transcript from CBS 60 Minutes broadcast entitled "On Guard"); see also *supra* note 173.

200. See Kahn, *supra* note 8, at 343.

201. During the past decade, several congressional bills were introduced in an attempt to amend § 9(b)(3) so that the "guard" definition would be both less ambiguous and less sweeping. One bill proposed in 1983 would have amended the statute to read that "employees of employers engaged in the business of protecting and transporting the property of their customers shall *not* be deemed to be guards." See H.R. 2197, 98th Cong., 1st Sess. (1983) (emphasis added). This amendment, which never made its way out of committee, would have eliminated inclusion of armored truck guards within § 9(b)(3)'s "guard" definition but would have preserved the standing of traditional plant guards and "contract guards" thereunder. This compromise, then, would have effectuated Kahn's "plant-guard functions" test for determining "guard" status. See *supra* note 200 and accompanying text.

Other proposed amendments introduced in 1977, 1983 and 1985 were troublesome to the extent that they had the potential, if so construed, to remove "contract guards" from the scope of § 9(b)(3)'s "guard" definition. A bill presented as part of the Labor Reform Act of 1977, see *supra* note 24, was identical to one subsequently considered in 1983 and read as follows:

Section 9(b)(3) is amended by striking " , or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." and substituting "nonguard employees of the *same employer* at the *same location*, or if such organization is directly affiliated with any national or international labor organization which represents nonguard employees of the *same employer* at the *same location*."

S. 1883, 95th Cong., 1st Sess. § 4 (1977) (emphasis added); see also H.R. 8410, 95th Cong., 1st Sess. § 4 (1977); H.R. 2198, 98th Cong., 1st Sess. (1983). Such an amendment would be defective if the NLRB and the federal courts interpreted the language "same employer" and "same location" together to refer only to actual employers of "contract guards" and not to employers' customers who use "contract guards" on their own premises. Also, in light of the interpretation given to § 9(b)(3)'s "indirect affiliation" term, see *supra* notes 79-93 and accompanying text, there is some question as to the import of striking the "indirect" language

9(b)(3) are being interpreted consistently with the provision's legislative history and spirit, an opportunity exists to ameliorate the statutory perversion caused by the expanded "guard" definition.

CONCLUSION

The most recent decisions of the National Labor Relations Board gleaned, in a logical and accurate fashion, the legislative intent of section 9(b)(3). The Board's opinions perceived Congress' resolve to discourage the formation of mixed unions via the disincentive mechanism of the statute, which proscribes Board certification of such organizations. One glaring exception to this success, however, is the Board's misapplication of the "guard" definition. The problems with current interpretation of that definition, when coupled with the continued weakness of independent guard unions and nagging doubts over the validity of the "divided loyalty" concern, necessitate some form of reappraisal. The correct forum in which to reevaluate the fundamental tenets of section 9(b)(3) is Congress. Participation in congressional hearings by all representative members of management and labor affected by the statute would help facilitate a solution acceptable to all. If the original "divided loyalty" concern of Congress is determined to be without foundation, repeal of section 9(b)(3) is warranted. If, on the other hand, that concern remains compelling, repeal would not promote stable labor relations, and some form of statutory amendment would be indicated. Whatever the final conclusion, reevaluation of section 9(b)(3) must be approached circumspectly because under no circumstances should the cardinal rights of employees, as first established by the NLRA, be restricted unless sound policy considerations dictate that end.

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from the statute.

Finally, a bill presented in the first half of 1985 suffered from the same problem as the 1977 and 1983 measures discussed above because it would have amended § 9(b)(3) by inserting the word "plant" before every statutory reference to "guard" or "guards." See S. 1018, 99th Cong., 1st Sess. (1985); H.R. 2489, 99th Cong., 1st Sess. (1985). This proposed amendment, which was stalled in committee at the time of this Note's publication, would be problematic if the Board and federal courts—absent any clearer indicia of legislative intent—refused to read the term "plant guard" as encompassing the duties assumed by "contract guards."

